UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES,
SAN FRANCISCO BRANCH OFFICE

SHAMROCK FOODS COMPANY

and Case 28–CA–150157

BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-CIO-CLC

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for the General Counsel.
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(Weinberg, Roger & Rosenfeld), for the Charging Party Union.

DECISION

Statement of the Case

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case alleges that Shamrock Foods Company committed numerous unfair labor practices at its Phoenix, Arizona warehouse between January and July 2015 to discourage union or other protected activity, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. Among other things, it alleges that the Company, by and through over 10 different managers and supervisors, unlawfully interrogated, surveilled, and threatened employees, solicited employee complaints and grievances, promised and granted employees better wages and benefits, took union flyers away from employees, and discharged or disciplined two prounion employees (Thomas Wallace and Mario Lerma). It also alleges that the Company unlawfully maintained numerous overbroad rules in its employee handbook during the same period.[1]

[1] The complaint issued on July 21, 2015, and was subsequently amended on August 13 and at the hearing. See GC Exhs. 1(g), (m), (t); and Tr. 19–23, 750. The Board's jurisdiction is undisputed and well established by the admitted facts.

A hearing on the complaint allegations was held over 7 days between September 8 and September 16, 2015.[2] Thereafter, on November 25, the General Counsel and the Company filed posthearing briefs. After carefully considering those briefs and the record as a whole, for the reasons set forth below I find that the Company violated the Act substantially as alleged, committing over 20 unfair labor practices during the union campaign, including unlawfully discharging Wallace and disciplining Lerma, and unlawfully maintaining several overbroad confidentiality, blogging, solicitation/distribution, and other conduct rules in the employee handbook.[3]

I. BACKGROUND

Shamrock Foods operates food distribution warehouses in several states. In addition to the subject warehouse in Phoenix, Arizona, the Company has warehouses in California, Colorado, New Mexico, and Oregon. The Phoenix facility is the largest, with approximately 280 warehouse workers, including pickers, runners, throwers, and forklift operators, and 250 drivers.[4]

In 1998, the Teamsters Union attempted to organize the Phoenix warehousemen and drivers. The Company committed several unfair labor practices in response to the organizing campaign, including unlawfully discharging an employee. See *Shamrock Foods Co*., 337 NLRB 915 (2002), enfd. 346 F.3d 1130 (D.C. Cir. 2003). And the organizing campaign was ultimately unsuccessful.

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[2] Pursuant to the General Counsel's unopposed request, at the end of the last day of hearing on September 16, the record was held open indefinitely to allow the Regional Office additional time to investigate a new charge the Union had filed the previous day seeking a remedial bargaining order under *NLRB v. Gissel Packing Corp.*, 395 U.S. 575 (1969). Thereafter, the Respondent requested that three additional documents be included in the record. As there was no objection, the request was granted by order dated October 21, and the documents were admitted as Respondent exhibits 6, 7, and 8. The order also added certain related documents as ALJ exhibits 1–5. Finally, as the Union had recently withdrawn the *Gissel* charge, the order closed the hearing record. Thereafter, on November 25, the General Counsel moved to correct the record to include certain attached documents that had been inadvertently omitted from General Counsel exhibit 2. As the motion is consistent with the record and unopposed, it is granted. The record is therefore corrected to include the documents as General Counsel exhibits 2(b)–(f).

[3] Specific citations to the transcript and exhibits are included where appropriate to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp*., 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[4] Although the Company often refers to its warehouse workers as "associates," they are consistently referred to here using the more traditional, statutory term "employees" to avoid any confusion.

More recently, in mid to late 2014, the Teamsters also attempted to organize the Shamrock warehouse in southern California. Around the same time, in late November, Steven Phipps, a longtime forklift operator at the Phoenix warehouse, decided to contact a different union—Bakery, Confectionery, Tobacco Workers' and Grain Millers (BCTGM) Local 232—about representing the Phoenix warehouse workers. The Union advised Phipps to keep the campaign "covert" at the beginning, and Phipps followed this plan throughout the following December, January, and February. He only spoke or met with one or a few employees at a time that he trusted and believed would sign a union card, and always offsite, never in the warehouse or parking lot.

Nevertheless, by late January 2015, word of the union campaign was spreading "like wildfire" in the warehouse. Over the next few months, more and more employees also began attending offsite meetings. Accordingly, on April 26 and 27, Phipps made a formal, public announcement in the breakroom about the campaign. (Tr. 485, 494–499, 520–521, 544–545, 612–617.)

II. The Alleged Unfair Labor Practices

A. Alleged Unlawful Statements at Company Meetings

The complaint alleges that many of the unlawful threats and other statements were made at seven large or small group meetings between late January and late April 2015 that were conducted by one of three corporate or local managers: Vice President (VP) of Operations Mark Engdahl, then-Human Resources (HR) Director Natalie Wright, or Phoenix Warehouse Manager Ivan Vaivao. All but one of the meetings (a small meeting in mid-February) were secretly recorded by Phipps or Lerma, and both the recording and a certified transcript thereof were placed in evidence by the General Counsel.

1. January 28 town hall meeting (Engdahl)

The complaint alleges that the Company made unlawful statements at two meetings on January 28. The first was a large "town hall" meeting with all of the warehouse workers that was conducted by Operations VP Engdahl that morning. Engdahl runs all of Shamrock's operations, and reports directly to Company President/CEO William (Kent) McClelland. The General Counsel alleges that Engdahl unlawfully threatened employees at the meeting that they would lose benefits if they supported a union by telling them that the "slate is wiped clean" on wages, benefits, and working conditions when collective bargaining begins (GC Exh. 1((g), par. 5(g)(1)).

Engdahl began the meeting by saying he was going to "educate" them about the southern California Teamsters' campaign and unions in general. He told them they could research "tons of stuff" for and against unions on the internet to make their own judgments; however, he was going to give them "the facts" and would "not lie" to them. He said the employees in southern California had "made good decisions" and the facility there remained "union free." He explained that a union is simply "a business" that tries to grow and get more dues by misrepresenting that they can fix all the employees' problems, and would only "cause strife between both sides." He said Shamrock wanted to deal with employees directly "as a family," and to fix problems by "working together and talking to each other . . . we talk directly with you, you talk with us, you bring up problems, we try to fix it." He therefore encouraged the employees to continue using

the Company's "open-door" policy to raise their problems. He said the Company could "always tweak things," and wanted to "work to make things better."

Engdahl also told the employees that there were various other reasons they should "think long and hard" before signing a union card. He warned them that the card is a "legally binding document" and that they were "going to pay hell trying to get it back." He also said that a company could voluntarily recognize the union if it got over 50 percent of employees to sign the cards. He then stated,

> And sometimes I've seen it in the past where companies have done that for probably not really good reasons, because what happens when a company is represented and you go into collective bargaining? The slate is wiped clean on wages, the slate is wiped clean on benefits, the slate is wiped clean on working conditions. It's all up to collective bargaining at that point in time. Right? So sometimes a company may say, "You know what, I think we're paying too much and our benefits are too rich; so I'm going to grab the union, bring them in here, sign up with them, whether my associates like it or not, and we're going to collective bargain."
>
> And guess what? At the other end of the pipeline, when you come out with a contract, all of a sudden the people have got less wages, they took away healthcare benefits, they did this, they did that. It actually saves companies money because there's no guarantees when you go into collective bargaining that you're going to come out with anything better than you got. In fact, you could come out with something worse than what you got. And they won't tell you that either. Okay. Everything is up for grabs.

Engdahl also returned to this point later, in response to a question from employee Wallace about why Shamrock's competitors are unionized. Engdahl said that, in his opinion, two of the Company's competitors (Sysco and US Foods) used the union "to keep the wages down because everybody's paid the same then . . . they don't do well with incentives." He also noted that it takes a supermajority of "70 percent plus one" to decertify or vote a union out. (GC Exh. 8(a) and (b).)[5]

Whether antiunion employer statements such as the "slate is wiped clean" in bargaining are coercive depends on the context in which they are made. As the Board stated in *BP Amoco*, 351 NLRB 614, 617 (2007):

> [E]mployer statements to employees during an organizing campaign to the effect that bargaining will start from "zero" or from "scratch" are "dangerous phrase[s],"

[5] I discredit the testimony of Natalie Wright, who as indicated above was the HR manager at the time (and is now a part-time HR specialist). Wright attended the town hall meeting with other managers, and was called to testify as an adverse witness by the General Counsel under FRE 611(c). Wright repeatedly refused to say if unions were discussed at the meeting, insisting that it was just an "educational" meeting, agreed to answer the General Counsel's question only when directed from the bench to do so, and then admitted only that unions were mentioned in a video and in reference to the California campaign (Tr. 379–381). As indicated above, the audio recording secretly made by Phipps shows that the meeting was entirely about unions.

> which carry with them "the seed of a threat that the employer will become punitively intransigent in the event the union wins the election." Contemporaneous threats or unfair labor practices may lend additional coercive meaning to the employer's remarks. Such statements are unlawful and objectionable when, in context, "they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure on what the Union can induce the employer to restore." On the other hand, such statements are permissible when they merely describe the bargaining process and/or are made in direct response to union promises. Similarly, statements that employees could lose benefits as a result of bargaining have been found lawful where they "merely [state] what could lawfully happen during the give and take of bargaining." [Citations omitted].

Here, although some of Engdahl's other statements at the meeting were untrue,[6] there is no allegation that they were unlawful.[7] Further, Engdahl did not explicitly say that Shamrock would take away existing benefits. However, by emphasizing, exclusively, what the other named and unnamed employers have intentionally done to reduce employee benefits through collective bargaining, Engdahl clearly suggested or implied that Shamrock would do the same thing. See *Pittsburgh Press Co*., 252 NLRB 500, 504 (1980); and *Madison Kipp Co*., 240 NLRB 879 (1979) (while an employer may lawfully support its antiunion statements with examples where employees at other companies suffered negative consequences following collective bargaining, it may not do so in a manner that employees would reasonably construe as a threat to deliberately pursue the same result). Moreover, Engdahl made no effort at the meeting to dispel or temper that implication by assuring employees that Shamrock would bargain over their benefits in good faith and/or that their benefits might also go up or stay the same through the give and take of bargaining. Compare, for example, *Manhattan Crowne Plaza*, 341 NLRB 619 (2004) (finding no violation where the employer acknowledged that "each set of negotiations is different"); and *Monroe Mfg. Co*., 200 NLRB 62 (1972) (same, where the employer stated, "That is not to say that anything like that will happen here. We hope that even if this union is successful [we] will continue to grow.").

The Company's posthearing brief (pp. 26–27) suggests that what Engdahl said or did not say at the January 28 town hall meeting is insignificant, as Engdahl and other managers

[6] For example, there is no "70 percent plus one" requirement to decertify a union. In fact, there is no requirement that even 50 percent plus 1 vote against the union. The NLRB will conduct a decertification election if 30 percent or more of the unit employees sign a petition to do so, and the union will be decertified unless 50 percent plus 1 of the votes cast in the election are *in favor* of union representation, i.e., the union loses in the event of a tie vote. See *Best Motor Lines*, 82 NLRB 269 (1949); NLRB Statements of Procedure, Secs. 101.17–101.18; and the Board's website, https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/decertification-election.

[7] The complaint also alleges that Engdahl "granted employees benefits" on January 28 by telling employees who complained about working conditions to make an appointment to come see him. See par. 5(g)(2). However, the General Counsel's posthearing brief does not address this allegation, and thus it appears to have been abandoned. In any event, the General Counsel failed to carry the burden of proof and persuasion.

repeatedly told employees at other meetings that their benefits could be better, worse, or the same after going through the collective-bargaining process. However, there is no record evidence that Engdahl or other managers actually said this to all of the warehouse employees at any other meeting(s) during the relevant period. Although Phoenix Warehouse Manager Vaivao made such a statement a month later, on February 24, it was at a much smaller meeting with only 8–10 employees. See Exh. 9(a), at p. 13; and Tr. 175–178, 528–530.[8] Moreover, as discussed below, Vaivao made other statements at the February 24 meeting that were unlawful. And he, Engdahl, and several other company managers and supervisors committed numerous other unfair labor practices as well.

Under all the circumstances, therefore, it is likely that employees would have reasonably understood Engdahl's remarks, not merely as a caution that their benefits could go down, but as an effective threat by a high-level manager that they would go down, if they supported a union. Accordingly, the statements were coercive and unlawful.

2. January 28 roundtable meeting (Wright)

The second meeting on January 28 was a smaller "roundtable" meeting with 15–20 employees, including Phipps. The meeting was conducted by then-HR Manager Wright immediately after the town hall meeting. It was the first of two such meetings Wright conducted that day on different shifts, and the first of any such meeting she had conducted since October 2013, the year she was hired. The General Counsel alleges that Wright unlawfully solicited complaints and grievances at the meeting and promised to remedy them if the employees refrained from union activity (GC Exh. 1(g), par. 5(h)).

Wright began by acknowledging that it had "been a while" since the Company had held roundtable meetings. She said that the Company was going to try and do it "a little bit more often" to find out "what's going on and . . . where [she] could help." She also said the Company was going to do it "a little bit differently" by having the meetings with smaller groups, as the large meetings could be "a little cumbersome, a little bit overwhelming to deal with so much and

[8] As noted by the Company, the record indicates that Vaivao and Engdahl held similar small meetings with additional employees on different shifts. However, evidence fails to establish that all of the warehouse employees attended the meetings or that Engdahl and Vaivao made the same statements at all of the meetings. Engdahl testified that he always speaks off the top of his head at the meetings (Tr. 732–735). And while Vaivao testified that he said wages could go up or down or stay the same at other small "communication" meetings in February that were conducted by Wright, he acknowledged that the meetings were not about the Union and he only made the statement if one of the employees raised the issue (Tr. 899–901, 931). See also GC Exh. 7(a), the transcript of the recording of the February 5 communication meeting (which confirms that the issue never came up and Vaivao did not make such a statement). Finally, contrary to the Company's contention (Br. 28 n. 8), the record is also insufficient to establish that the Union contumaciously failed to produce recordings from the other meetings (i.e. recordings of meetings other than those made by Phipps or Lerma that were put in evidence by the General Counsel) in response to the Company's hearing subpoena. Accordingly, the Company's request for an adverse inference that recordings of other meetings would "corroborate the noncoercive context of Shamrock's discussions with employees concerning the possible results of unionization" is denied.

trying to filter out what [the] top 10 issues were out of 250 people." Wright advised them that she had "made sure" their names would not be revealed to "management" so that they would feel more comfortable speaking up at the meeting.

Wright then asked for their "feedback" on recent changes, what they liked and disliked, and "recommendations [for] more changes." Employees voiced various complaints in response, including that there were no written guidelines or standard procedures for implementing the changes; that their tools and equipment (forklifts, pallet jacks, radios, and scanners) were old and poorly maintained; that there were too few quality controllers scheduled per shift; that they were averaging a lot less money under the new pay plan; that they had to move more heavy pallets every day without any incentives or increase in pay; and that supervisors and managers insulted, disrespected, and lied to them, and failed to respond when they raised problems using the Company's "open door" policy.

Wright's assistant took notes of the complaints, and Wright thanked the employees for their feedback and time. Wright thereafter took the complaints to upper management. (GC Exh. 15(a) and (b); Tr. 362, 383–390, 504.)

An employer's solicitation of employee grievances during a union campaign inherently includes an implied promise to remedy them and is unlawful unless the employer has a "past policy and practice" of soliciting grievances and did not "significantly alter[] its past manner and methods" of doing so. See, e.g., *Manorcare Health Services-Easton*, 356 NLRB 202 (2010); *Barberton Manor*, 252 NLRB 380 (1980); and *Carbonneau Industries*, 228 NLRB 597, 598 (1977).

Here, as indicated above, the Teamsters had recently campaigned to organize Shamrock's warehouse in southern California. And the Company was obviously aware of it and concerned about the campaign spreading to the Phoenix warehouse, which the Teamsters had also tried to organize in the past. Further, there was, in fact, a union campaign ongoing at the Phoenix warehouse at the time; it was just by a different union, BCTGM Local 232. Although the campaign was still covert at that time, and there is no direct evidence that the Company knew about it, there is strong circumstantial evidence that the Company at least suspected it was going on. As indicated above, the antiunion town hall meeting with all of the warehouse employees was held shortly after word of the campaign began spreading "like wildfire" through the warehouse. Further, the Company held the antiunion meeting at that time even though, according to Engdahl's own report, the Teamsters campaign in California had already failed.

As for the Company's past practice, there is no dispute that the Company had a history of holding roundtable meetings with employees. Phipps himself testified that the Company had held hundreds of roundtable meetings at the warehouse over the 20 years he had worked there. However, the meetings were usually held to communicate information to employees, and only sometimes to solicit their feedback.[9] Further, no such meeting had been held in the past 15 months. And, as indicated by Wright's own comments, the January 28 roundtable meeting was both intended and presented as the first in a series of more frequent, smaller meetings with

[9] Tr. 573–575. I discredit Wright's testimony to the extent it indicates that soliciting employee complaints was standard practice at the roundtable meetings (Tr. 383–388). As previously noted (fn. 5), Wright was not a credible or reliable witness.

employees to solicit their feedback.[10] Thus, the meeting represented a significant departure from past practice. Moreover, it was held immediately after the antiunion town hall meeting, where Engdahl had assured all the warehouse employees that they did not need a union because they could talk directly to the Company and it would try to fix any problems they raised. Thus, it is unlikely that the connection between the two would have been lost on employees.

Accordingly, Wright's solicitation of the employees' complaints violated Section 8(a)(1) of the Act as alleged.

3. February 5 communication meeting (Vaivao)

The February 5 meeting was even smaller than the January 28 roundtable meeting, with only about 10 employees. Although HR Manager Wright again attended and occasionally spoke, the meeting was conducted by Phoenix Warehouse Manager Vaivao.[11] The General Counsel alleges that, like Wright on January 28, Vaivao unlawfully solicited complaints and grievances at the meeting and promised to remedy them if the employees refrained from union activity (GC Exh. 1(g), par. 5(k)).

Vaivao began by saying that it was a "communication follow-up meeting" to the prior roundtable meetings. Like Wright on January 28, he also explained why the smaller meetings were being held. He said that the Company had "decided" to have the smaller meetings after the town hall meeting "to be a little bit more intimate" so that employees would be more willing to speak up and tell the Company about "some of the issues that [are] out there, some of the obstacles that [Wright] and I can remove or report . . . to make sure those are removed." He said he wanted them to give him "feedback" on "what is really bothering" the employees; what the "main concerns" and "big issues" were. He assured them that he would take notes of their complaints and get back to them about whether the matter was "fixed" or not and why. He said the Company was "commit[ted]" to removing "most of the obstacles, as much as we can."

As on January 28, employees voiced various complaints in response, including about wages and benefits, working conditions, scheduling, and the "open door" policy. Vaivao advised them that he and Wright would "make sure" the Company "heard" their concerns and "in some cases "bring [] down a solution to resolve" them. With respect to the scheduling issues in particular, he said he would "definitely look into" them and "make adjustments." (GC Exh. 7(a), (b); Tr. 523–524.)[12]

[10] Although the Company denied in its answer that Operations Vice President Engdahl and HR Manager Wright were supervisors, it stipulated to their supervisory status at the hearing (Tr. 5–6, 20–21, 53, 65–66, 117). Their statements at the January 28 meetings are therefore nonhearsay party admissions under FRE 801(d)(2). See, e.g., *Ferguson Enterprises,* 355 NLRB 1121 n. 2 (2010).

[11] As with Engdahl and Wright, the Company denied in its answer that Vaivao was a supervisor, but stipulated to his supervisory status at the hearing.

[12] I discredit Vaivao's testimony about the February 5 meeting (Tr. 164–170, 175, 262–266). Like Wright, Vaivao was called as an adverse witness by the General Counsel during the case in chief. And like Wright's testimony about the January 28 town hall meeting, Vaivao's testimony about his role at the February 5 meeting, whether he solicited employee complaints, and whether any complaints were elicited, is clearly contradicted by the audio recording of the meeting

The only significant difference between the context and circumstances of Vaivao's solicitation of employee complaints and Wright's similar solicitation a week earlier is that Vaivao's promise to remedy the solicited complaints was more explicit. Accordingly, it was unlawful as well.

4. Mid-February union education meeting (Vaivao)

Vaivao thereafter also conducted so-called "union education" or "union prevention" meetings with small groups of employees, including one that employee Wallace attended with about eight other employees in mid-February.[13] The General Counsel alleges that Vaivao again unlawfully solicited complaints and grievances at the mid-February meeting and promised to remedy them if the employees refrained from union activity (GC Exh. 1(g), par. 5(l)).

The only evidence presented and cited by the General Counsel to support this allegation is Wallace's testimony that Vaivao "opened the floor to questions" after showing them an antiunion video, and that he "wanted to know if there [were] any issues that we wanted to bring up" after Wright explained to them how their pay and benefits compared to others in the industry (Tr. 653–654).[14] While there is nothing incredible about this testimony, it is too vague or sketchy to establish that Vaivao actually solicited complaints or grievances as at the February 5 communication meeting. Accordingly, the allegation is dismissed.

5. February 24 union education meeting (Vaivao)

Vaivao also held several small meetings on February 24, including one that Phipps attended with eight other employees. The General Counsel alleges that Vaivao committed two additional violations at that meeting: first, that he unlawfully created an impression that the employees' union activities were under surveillance by telling them that the Company had an idea who was organizing; and second, that he unlawfully asked the employees to ascertain and disclose the union activities of other employees by asking them to raise their hand to let him know if another employee had contacted them (GC Exh. 1(g), par. 5(m)(1), (2)).

Vaivao began by saying that it was another "union education" meeting so that the employees knew the "essentials." He said that employees, and even a meat plant manager, had recently come up to tell him and Brian Nicklen, the inbound manager, that they were being approached by union supporters, "so we kind of have some ideas . . . of who's out there." He also said that some had expressed concern that they might be seen talking to the union supporters on the Company's surveillance cameras. He assured the employees that the Company does not use the cameras to conduct surveillance of such activities. Vaivao also told the employees that, if they did not want to sign a union card or be approached anymore, "tell them no, you won't be a part of it [and] [r]aise your hand, say, hey, man, this guy is bugging me." He then listed various

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secretly made by Phipps.

[13] I discredit Vaivao's testimony (Tr. 155–156) that no such "union education" or "union prevention" meetings were held, as the record as a whole clearly establishes otherwise. See, e.g., GC Exhs. 9(a), (b), and 10(a), (b), the recordings and transcripts of his subsequent remarks at the February 24 and March 26 meetings, discussed infra.

[14] Unlike the other meetings at issue, there is no audio recording of the mid-February meeting (apparently because neither Phipps nor Lerma attended it).

reasons why they should be cautious or wary of supporting a union.[15] As at the mid-February educational meeting, he also showed them an antiunion video. (GC Exh. 9(a), (b); Tr. 529–530.)[16]

An employer unlawfully creates an impression of surveillance when employees would "reasonably assume" from the employer's statements that management had placed their union activities under surveillance, i.e. that "members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexteel Industries*, 311 NLRB 257 (1993). Thus, there is no violation where the employer's statements indicate that the information concerning the employees' union activities was voluntarily provided to the employer by their coworkers. See, e.g., *North Hills Office Services,* 346 NLRB 1009, 1103 (2006) (supervisors' statements to employees that two of their coworkers had reported that they had driven employees to a union meeting or distributed union literature during working hours did not unlawfully create an impression of surveillance in the absence of any evidence that management solicited the information); and *Bridgestone Firestone South Carolina*, 350 NLRB 526 (2007) (plant manager's letter to employees thanking "the many team members who have chosen to provide information to me regarding the recent [union organizing campaign]" did not unlawfully create the impression of surveillance). Here, Vaivao's statements indicated that he knew about the employees' union activities because employees and a manager had voluntarily informed him and Nicklen after being approached by union supporters. Accordingly, this allegation is dismissed.

On the other hand, Vaivao's additional statement during his antiunion presentation, that employees who receive unwanted solicitations should "raise [their] hand" and let management know the union supporters are "bugging" them, was clearly unlawful under Board precedent. See, e.g., *Sunbeam Corp.*, 284 NLRB 996, 997 (1988) (company president unlawfully asked employees to report the identity of union supporters by advising them to "tell these union pushers [to] . . . just go away and leave you alone, [and] [i]f they won't leave you alone, let me know about it, and we will see that something is done," as the request was broad enough to cover protected union solicitation); and *Hawkins-Hawkins Co*., 289 NLRB 1423 (1988) (plant manager unlawfully told employees that "if anyone was harassed by the union or by fellow employees" they should "contact management and they would take care of it," as the manager did not explain what he meant by "harassment"). See also *Winkle Bus Co.*, 347 NLRB 1203, 1204 (2006); *Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003), enfd. 357 F.3d 692 (7th Cir. 2004); and *Tawas Industries,* 336 NLRB 318. 322 (2001), and additional cases cited there.[17] Accordingly, that allegation is sustained.

[15] For example, like Engdahl at the January 28 antiunion town hall meeting, Vaivao told the employees that it would take "70 [percent] plus one" to vote a union out. As previously noted (fn. 6), however, this is untrue.

[16] Again, I discredit Vaivao's testimony about the meeting (Tr. 175–190), as it is contradicted by the recording and transcript of the meeting and other evidence consistent therewith.

[17] Although Vaivao testified that an employee had complained that union supporters had harassed him by throwing pens at him when he refused to sign a card (Tr. 182), Vaivao did not mention this at the meeting. Nor does the Company's posthearing brief cite any other basis to distinguish the cited Board precedent; indeed, the brief does not even address the allegation.

6. March 26 union prevention meeting (Vaivao)

Vaivao held another meeting on March 26 with a small group of employees, including Lerma. James Allen, a new HR representative at the time, was also present. The General Counsel alleges that Vaivao made several more statements at the meeting that unlawfully created the impression of surveillance; specifically, that the Company knows everything that is going on and who they are, that there was a union meeting off the property a few weeks earlier, and who attended the meetings (GC Exh. 1(g), par. 5(n)).[18]

Vaivao began by saying that it was another "union prevention" meeting. He said the Company was continuing with such meetings because employees were "getting fed up" with the union supporters. He said three employees had come up to him that week complaining about being approached to join the Union and asking him if he could make them stop. Vaivao explained that the union supporters had the right to organize. However, he said they were "disgruntled" and had "personal agendas" against the Company. He said, "We know that. We know who they are. We know they've been conducting meetings offsite." Vaivao said that the union supporters were spreading "lies" and that there was nothing to "substantiate" what they were "throwing out there." He said it was his job to "protect" employees by telling them the "truth." He then repeated that,

> [W]hoever is doing that out there, we know who they are, because they come the next day to me. They come the next day to tell me that. . . . So I know who they are. I know there's meetings out there. I know there was a meeting a . . . few weeks ago. And I know who attended.

Vaivao repeated the same point twice more later in the meeting. Thus, after Allen had finished introducing himself and addressing the employees, Vaivao said,

> I appreciate everybody showing up. . . . But we're going to continue to have all the meetings. As long as there's guys out there, I'm going to review propaganda for the union organizers. . . . I know who they are. I know exactly who they are. I know who's been asked, the guys . . . So know that I'm out there. I'm going to be vigilant. . . .I'm going to be vigilant, because I know what the truth is.

And at the very end of the meeting, after again discussing some of the reasons not to support a union,[19] he said,

[18] Although the complaint alleges that Vaivao, Nicklen, and an unknown HR representative committed the alleged violations at the March 26 meeting, the General Counsel's posthearing brief identifies only Vaivao as the offending speaker. The complaint (par. 5(o)) also alleges that, on the same date, Vaivao, Nicklen and an unknown HR representative informed employees that it would be futile for them to select the Union as their bargaining representative by telling employees that shifts cannot be changed. However, the General Counsel's posthearing brief does not address this additional allegation, and it therefore appears to have been abandoned. In any event, the General Counsel has failed to carry the burden of proof and persuasion.

[19] For example, Vaivao again incorrectly told the employees that it takes "70 percent plus one" to vote a union out.

> And you should feel that way. You should stand there and tell whoever it is, dude no. If you talk to me again—several guys are . . . coming up to me and say[ing] I want . . . a statement that these guys will leave me alone. . . . So that's where we're at right now. Until we have that, we have a little different conversation with them. But we know who the guys are. I want you guys to be aware of that. I want you guys to understand that.

(GC Exh. 10(a), (b).)

As discussed above, an employer's statements concerning its knowledge of employees' union activities do not unlawfully create the impression of surveillance where the statements indicate that the information was voluntarily provided to the employer by their coworkers. Here, as at the February 24 meeting, Vaivao indicated that employees who did not support the Union had voluntarily provided the information to management about who the union supporters were and who attended the meetings. Accordingly, these allegations are likewise dismissed.

7. April 29 communication meeting (Engdahl)

The Company held another small communication meeting on April 29 with about 8–10 mostly senior employees from the first shift, including Phipps. Both Vaivao and Operations VP Engdahl attended and spoke at the meeting. The General Counsel alleges that Engdahl made several unlawful statements during the meeting; specifically, that he unlawfully promised and granted benefits to employees by guaranteeing or committing to them that there would not be a layoff during the slow summer season like the previous year; created the impression of surveillance by telling employees that the Company understood who was behind the Union; threatened employees with unspecified reprisals by telling them the Union will hurt them and everybody in the future; and informed employees that it would be futile for them to support the Union by telling them that the Company does not have to agree to anything through collective bargaining (GC Exh. 1(g), par. 5(t); Tr. 19–23).

Engdahl began the meeting by handing out a document, which he said was "going out to every person in this building." He said the document was a "follow-up" on the issue of layoffs that had been discussed in previous meetings and "some other things last year that we felt we didn't handle correctly." He then stated,

> So, we're committed to the point where we put it in writing now, okay, that we will not do these things. And you can take that to the bank. So, we owed you that feedback, now we've given it to you. It's in writing. And it's probably not so important for you all. It's more of a lower on the totem pole for folks who were worried about layoffs and things like that. Well, so this will ease some of their fears.
>
> But, I wanted to start by giving this all to you all and have a little discussion with you on what's going on here with this union organizing stuff, okay. And I understand who's behind it. I understand that you don't care what anybody else thinks. I understand that you're doing it for your own personal reasons, and that's great, have at it. But, what I am going to do is straighten out some things with some facts, okay, and some truths. And I'm going to call bullshit on a lot of stuff that's being spread, because its wrong. It will hurt

> Shamrock. It will hurt all of you. It will hurt everybody in the future, okay. And I don't want that to happen.
>
> This is all my opinion. And I'm entitled to my opinion, just like you're entitled to yours, okay. I've been a Teamster for seven years. I was in the union for seven years. I understand it inside and out. I know what it's good for and what it's not good for. And it's not good for us here at Shamrock, I can tell you that, okay.

Engdahl then discussed various reasons why, in his "opinion," the Union would not be good for them. For example, he said that the Union would never negotiate a higher wage rate for them than at Sysco or U.S. Foods; that nothing would change with respect to their health insurance because it is mandated by "Obamacare" and there was only one "bucket of money" to divide up between wages, benefits, and equipment to run the warehouse; and that "nobody can say whether [a union contract] would be better or worse." He then closed by saying,

> Remember, the company pays wages, benefits, sets work conditions—not the union. The only thing the union can do is come to collective bargaining and ask. They can ask for things. The company doesn't have to agree to anything, nothing—other than what they want to. It's bargaining. Bargaining can go on forever. It can never end. It's collective bargaining. All you have to do is bargain in good faith. All right?

(GC Exh. 12(a), (b).)[20]

It is well established that an employer violates Section 8(a)(1) of the Act by promising or granting benefits during a union campaign in order to dissuade its employees from supporting the union. See, e.g., *Sisters Camelot*, 363 NLRB No. 13, slip op. at 7 (2015) ("The lawfulness of an employer's promise of benefits during a union organizational campaign depends upon the employer's motive. Thus '[a]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.'"); *Network Dynamics Cabling, Inc*., 351 NLRB 1423, 1424 (2007) (the Board examines "the record evidence as a whole, including any proffered legitimate reason for [granting the benefit], to determine whether "it supports an inference that [it] was motivated by an unlawful purpose"); *Real Foods Co*., 350 NLRB 309, 310 (2007) ("The granting of benefits to employees in the middle of union organizational activity 'is not *per se* unlawful where the employer can show that its actions were governed by factors other than the pending election.' The General Counsel bears the burden of proving, by a preponderance of the evidence, 'that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation.' If the General Counsel makes such a showing, the burden shifts to the employer to demonstrate a legitimate business reason for the timing of the benefit, such as by proving that the benefit was 'part of an already established Company policy and the employer did not deviate from the policy upon the advent of the union.'"); and *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961–962 (2004) ("[A] grant of

[20] As indicated above, Vaivao also spoke at the meeting, addressing various "rumors" and statements by union supporters that he said were "not true." Again, I discredit Vaivao's and Engdahl's testimony about what they said at the meeting (Tr. 225–234, 740–741), as it is clearly contradicted by the recording and transcript.

benefits . . . during a union organizing campaign violates the Act unless the employer can demonstrate that its action was governed by factors other than the pending election. To meet this burden, the employer needs to establish that the benefits conferred were part of a previously established company policy and the employer did not deviate from that policy on the advent of the union.") (Citations and footnotes omitted).

Engdahl's no-layoff commitment was clearly unlawful under these principles. First, it plainly constituted a promise or grant of a substantial benefit.[21] *Hertz Corp*., 316 NLRB 672, 688 (1995); and *Justrite Mfg. Co*., 238 NLRB 57, 61 (1978). Second, there is no dispute that the union campaign was well underway at that point and that the Company knew about it.[22] Indeed, the Company had been holding meetings with employees for the past 2 months to address and respond to the campaign. Moreover, Phipps had announced the union campaign in the breakroom just a few days earlier, on April 26 and 27, and Engdahl again specifically addressed the campaign immediately after announcing and distributing the no-layoff commitment. Third, Engdahl acknowledged at the hearing that the Company had never made such a written commitment in the past, notwithstanding that there had occasionally been other layoffs (Tr. 759).

As for general assertions of harm resulting from union organizing, while not unlawful by themselves, such assertions may become unlawful "if uttered in a context of other unfair labor practices that 'impart a coercive overtone' to the statements." *Reno Hilton Resorts Corp*., 319 NLRB 1154, 1155 (1995) (citations omitted). Thus, in *Reno Hilton* the Board found that the employer's vague assertion that the "union would not benefit you in any way and could hurt you seriously" was unlawful in light of the employer's numerous other unfair labor practices, including threats of closure, discharge, and loss of benefits, which gave the assertion "both specificity and force." Accord: *Homer D. Bronson Co.*, 349 NLRB 512, 540–541 (2007) (finding employer's statement that the union was "just going to hurt" unlawful for the same reason), enfd. 273 Fed. Appx. 32 (2d Cir. 2008).[23]

Here, Engdahl's statement to employees that supporting the Union "will hurt" them in the future was likewise made in the context of numerous other unfair labor practices. Indeed, as discussed above, Engdahl himself had previously threatened all of the employees at the January 28 town hall meeting with loss of benefits if they supported the Union. Moreover, as fully discussed infra, just a few weeks before the April 29 meeting, the Company unlawfully

[21] Although the actual document containing the written commitment is not in evidence, Engdahl's above-quoted statements to employees at the meeting—that the Company was "committed" to no layoffs "to the point where we put it in writing," and that they could "take that to the bank" —are sufficient to establish the promise or grant of benefit. It is therefore unnecessary to pass on the General Counsel's request (GC Br. 20 n. 21) for an adverse inference based on the Company's failure to produce a copy of the document in response to paragraph 37 of the General Counsel's August 25 subpoena duces tecum (GC Exh. 2(e), attachment 1, p. 6).

[22] See *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006) (grant of benefits during union campaign is not unlawful unless employer was aware of it).

[23] See also *Downtown Toyota*, 276 NLRB 999 (1985), cited by the General Counsel, where the Board affirmed the judge's finding that the employer's statements that the union is "only going to hurt you guys" and "I'll make more money and you guys will make less" were unlawful threats of unspecified reprisal and/or of futility.

discharged one of the more active union supporters (Wallace) after he openly complained about the Company's health benefits.[24] Accordingly, as in *Reno Hilton*, the statement violated the Act.

With respect to statements about the bargaining process, the lawfulness of such statements may depend on both their content and their context. See *Airtex*, 308 NLRB 1135 n. 2 (1992). Compare also *Medieval Knights, LLC*, 350 NLRB 194, 195 (2007) (finding no objectionable conduct where the employer, which had not committed any other objectionable or unlawful conduct, stated during a hypothetical exercise that an employer does not have to agree to any specific proposals, that all negotiations were different, that the bargaining process could take weeks, months, or even more than a year, and that an employer could "stall out the negotiations" by "giving in to lesser items or addendums" "that would make them show they were bargaining in good faith but not really getting anything done"), with *Kajima Engineering*, 331 NLRB 1604, 1616 (2000) (finding a violation where the employer, which committed numerous other unfair labor practices, stated during a preelection mandatory meeting that the company "could drag their heels and make it go on forever" and just had to "show good faith efforts of negotiations for at least an hour per month").

Here, as discussed above, Engdhal made the statement ("The company doesn't have to agree to anything, nothing . . . Bargaining can go on forever. It can never end . . . All you have to do is bargain in good faith") after unlawfully telling employees that supporting the Union "will hurt" them in the future. Moreover, he had previously unlawfully threatened employees at the January 28 town hall meeting with loss of benefits if they supported the union. Thus, considered in context, Engdahl's statement would reasonably be viewed by employees, not as a mere hypothetical like in *Medieval Knights*, but as the handwriting on the wall like in *Kajima*. Accordingly, it violated the Act as well.

As for Engdahl's statement that he understood who was behind the union campaign, as previously discussed Vaivao had repeatedly stated in prior meetings in both February and March that employees had volunteered such information to management. Moreover, as indicated above, Phipps had recently announced that he was behind the campaign. Thus, even if some of the employees at the April 29 meeting had not attended Vaivao's prior meetings, it is unlikely they would reasonably assume at that point that the employer had obtained the information through surveillance. Accordingly, like the similar allegations regarding the February and March meetings, this allegation is dismissed.

B. Other Alleged Unlawful Statements or Conduct

The complaint also alleges numerous other incidents during the same period (January–July 2015) where managers or supervisors made unlawful statements to employees or engaged in other unlawful conduct. The complaint alleges that these additional violations were committed by various managers and supervisors at all levels of the Company, including President/CEO Kent

[24] Given this background of other unfair labor practices, the formal nature of the meeting, and Engdahl's high-level corporate position, it makes no difference that Engdahl couched the statement and other imparted "truths" as his "opinion." See generally *Saint Luke's Hospital,* 258 NLRB 321, 322 (1981); and *J.S. Abercrombie Co*., 83 NLRB 524, 530 (1949), affd. per curiam 180 F.2d 578 (5th Cir. 1950). Nor does the Company argue otherwise; its posthearing brief does not specifically address the allegation.

McClelland, Operations VP Engdahl, Warehouse Manager Vaivao, Safety Manager Joe Remblance, Inbound/Receiving Supervisor Dave Garcia, Outbound/Shipping Supervisor Jake Myers, Sanitation Supervisor Karen Garzon, and Floor Captains Zack White and Art Manning.

1. January 25 conversation (White)

The General Counsel alleges that, on January 25 (3 days before the January 28 town hall meeting), Floor Captain White unlawfully interrogated Phipps about the employees' union activities and created the impression of surveillance by telling him that there were rumors in the warehouse about the organizing campaign (GC Exh. 1(g), par. 5(f)). The Company disputes both that the floor captains are supervisors within the meaning of the Act and that White made any unlawful statements during his conversation with Phipps.

As indicated above, Phipps is a longtime forklift operator at the warehouse and was the person who contacted BCTGM Local 232 in November 2004. He reports to Johnny Manda or Richard Gomez, whom he considers his immediate supervisors. He and other warehouse employees also receive assignments and directions from floor captains, including White and Manning, both of whom work on the loading dock. The floor captains' job is to expedite and make the work run smoothly. They do so by assigning or reassigning employees to particular areas or routes at particular times, directing the warehouse workers to perform particular tasks, and by deciding when to send an employee home or keep them late after their shift. They issue such assignments and directions based on their own judgment of who is best able to perform the work, regardless of whether the task or assignment is consistent with that individual's job description or prepared schedule for the day, and without consulting or seeking permission from anyone. And they are held responsible by the warehouse managers, who they meet with on a weekly basis, if there is an interruption or delay in the workflow.[25]

On January 25, Phipps happened to run into White at the time clock as they were both arriving for work. As they walked together to their respective work areas, White asked Phipps if he had heard about the union organizing in California. Phipps said he had heard rumors about it. White said the Teamsters were openly handing out cards to the drivers at the gates there. He told Phipps there were rumors that there was also an organizing campaign in the Phoenix warehouse. Phipps asked what White what he knew about it, as he did not want to have the Teamsters there. White said he had heard rumors that whoever was organizing was getting really close to getting a union in. He asked Phipps if he knew anything about it. Phipps did not directly reply, but said he remembered that the Company had unlawfully fired employees for supporting the Teamsters organizing attempt in 1998; that he knew what his rights were; and that he wanted to protect himself.[26]

[25] The foregoing findings regarding the floor captains' supervisory authority and duties are based on the credible testimony of Phipps (Tr. 485–492), Wallace (Tr. 647–648), and Lerma (764–766, 773, 779, 852) regarding their personal experiences and observations while working with White, Manning, and the other floor captains.

[26] The foregoing summary of the January 25 conversation is based on Phipps' testimony (Tr. 499, 612–617) and his May 2015 pretrial affidavit (R. Exh. 1, at 20). The Company did not call White to testify about the conversation.

Under Section 2(11) of the Act, an individual is a supervisor if he/she possesses, in the interest of the employer, at least one of the types of authority listed therein.[27] The burden is on the party asserting supervisory status to prove it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710-713 (2001).

Here, the General Counsel contends that the floor captains are supervisors because they possess the authority to assign and/or responsibly direct the warehouse employees using independent judgment.[28] As indicated above, the record supports this contention. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687, 693 (2006) (an individual has such authority if he/she has the authority to assign employees to a place, overtime period, or significant overall duties, or direct employees to perform tasks using judgment that involves the exercise of discretion that is more than routine or clerical and not dictated or controlled by detailed instructions, and is held responsible or accountable for performance of those tasks). See also *Golden Crest Healthcare*, 348 NLRB 727, 730 (2006); and *Croft Metals, Inc*., 348 NLRB 717 (2006).[29] Moreover, as

[27] See 29 U.S.C. Sec. 152(11) ("The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.")

[28] The record also contains some evidence that the floor captains have the authority to effectively recommend discipline; however, the General Counsel's posthearing brief does not contend that the floor captains are supervisors on that basis.

[29] The testimony of Phipps, Wallace, and Lerma regarding the floor captains' authority to assign and responsibly direct employees using independent judgment is conclusory and lacks supporting detail in some respects, which would normally mean that it fails to satisfy the burden of proof. See *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 2 (2015), and cases cited there. However, it is not fatal to the General Counsel's case under the particular circumstances here. On August 25, 2 weeks before the hearing, the General Counsel served a subpoena duces tecum on the Company requesting various documents, including documents relating to the duties of the floor captains (GC Exh. 2(e), attachment 1, pars. 1–7). The Company subsequently filed a petition to revoke these and other requests, but the petition was denied in relevant part by order dated September 4 (GC Exh. 2(a)). Nevertheless, the Company thereafter failed to timely produce any documents responsive to the requests at the hearing, either on September 8 as required by the subpoena, or on September 9. After a lengthy discussion of the matter with the parties, I concluded that the Company had failed to make a good-faith effort to timely comply with the subpoena requests as required, citing *McAllister Towing*, 341 NLRB 394 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). Consistent with *McAllister* and other Board decisions, at the General Counsel's request I therefore issued a variety of evidentiary sanctions against the Company, including permitting the General Counsel to introduce secondary evidence and barring the Company from cross-examining the General Counsel's witnesses or presenting any contrary testimony or other evidence on the subjects or issues to which the subpoena requests were addressed. See also *M.D. Miller Trucking*, 361 NLRB No. 141, slip op. at 1 n. 1 and JD. at 5 (2014); *Perdue Farms, Inc.,* 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 834 (D.C. Cir. 1998); *Roofers Local 30 (Associated Builders and Contractors, Inc.),* 227 NLRB 1444, 1449 (1977); and *Bannon Mills*, 146 NLRB 611, 614 n. 4, 633–634 (1964). I also ruled that such sanctions would include appropriate adverse inferences (see, e.g., *Chipotle Services,*

noted by the General Counsel, the record also contains so-called "secondary indicia" supporting supervisory status; specifically, that the captains are paid more than the warehouse workers and regularly attend management meetings. See generally *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007). Accordingly, the General Counsel has satisfied the burden of establishing that White and Manning are supervisors.[30]

However, the record fails to establish that White unlawfully interrogated Phipps. The relevant test is whether, under all the circumstances, the questioning would have reasonably tended to restrain or coerce an employee in the exercise of union or other protected concerted activity. See *Rossmore House*, 269 NLRB 1176 (1984), affd. sub. nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In applying this test, the Board typically considers a number of factors, including the identity of the questioner, the nature of the relationship between the supervisor and the employee, whether there is a history of employer hostility to union activity, the place and method of interrogation, the nature of the information sought, and the truthfulness of the employee's reply. See *Intertape Polymer Corp*., 360 NLRB

LLC, 363 NLRB No. 37, slip op. at 1 n. 1 (2015); and *Metro-West Ambulance Service,* 360 NLRB No. 124, slip op. at 1 and n. 13 (2014)), but reserved ruling on exactly what those inferences would be until after reviewing all the evidence and the parties' posthearing briefs. (Tr. 53–126.) Having now done so, I grant the General Counsel's request (Br. 4 n. 5) and find, for purposes of this case, that the Company's contumacious failure to produce the subpoenaed documents supports an adverse inference that they would have corroborated the testimony of Phipps, Wallace, and Lerma and provided additional evidence to establish that the floor captains have the authority to responsibly direct employees using independent judgment as required under Section 2(11) of the Act as interpreted and applied by the Board in *Oakwood Healthcare* and subsequent cases. See generally *Essex Valley Visiting Nurses Assn*., 352 NLRB 427, 441–444 (2008), reaffd. 356 NLRB No. 18 (2010), enfd. 455 Fed. Appx. 5 (D.C. Cir. 2012).

In its posthearing brief (p. 25) the Company argues that, not only should I decline to impose any adverse inference against it for failing to produce the subpoenaed documents, but I should impose an adverse inference against the General Counsel. The Company argues that such an adverse inference is warranted because the General Counsel failed to call or question White or Manning themselves regarding their supervisory authority. To paraphrase the D.C. Circuit, the Company's argument "is not only meritless, it reflects real chutzpah." *Fallbrook Hospital Corp., v. NLRB*, 785 F.3d 729, 733 (D.C. Cir. 2015). There is no record basis to assume that White and Manning would have testified favorably to the General Counsel. See generally *Torbitt & Castleman, Inc.*, 320 NLRB 907 n. 6 (1996), enfd. 123 F.3d 899, 907 (6th Cir. 1997); and *International Automated Machines*, 285 NLRB 1122 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988) (an adverse inference against a party for failing to call a witness is inappropriate unless it may reasonably be assumed that the witness would have testified favorably to that party). Moreover, without the subpoenaed documents, the General Counsel would not have been able to fully cross-examine or impeach them regarding their testimony. Finally, the sole authority cited by the Company for applying an adverse inference against the General Counsel—the judge's decision in *Desert Pines Golf Club*, 334 NLRB 265, 268 (2001) —has no precedential weight as the Board expressly disavowed the judge's discussion of the issue (see n. 1).

[30] The General Counsel also alleges and asserts that the floor captains are agents of the Company under 2(13) of the Act. However, the General Counsel's posthearing brief fails to specify the evidentiary basis for such a finding, and it is unnecessary to reach the issue given my finding that they are supervisors.

No. 114, slip op. at 1 (2014), enfd in relevant part 801 F.3d 224 (4th Cir. 2015); and *Fresh & Easy Neighborhood Market, Inc.,* 356 NLRB 546, 556 (2011), enfd. in relevant part 468 Fed. Appx. 1, 3 (D.C. Cir. 2012), and cases cited there.

Here, there are some factors supporting the General Counsel's contention that White's remarks and questions were coercive. White and Phipps had never had such conversations previously,[31] the union campaign at the warehouse was still covert, and there is no evidence that Phipps' role had been revealed to management at that point. Further, Phipps avoided directly answering White's questions, specifically mentioning the Company's previous unfair labor practices during the 1998 union campaign.[32]

However, White was a low level supervisor, the conversation arose casually, after a chance encounter at the time clock, and nothing in the record indicates that White's demeanor or tone or was hostile or threatening in any way. Further, Phipps knew that word of the union campaign had been spreading "like wildfire" through the warehouse, notwithstanding his attempts to keep it covert, and White's remarks and questions did not seek or invite any additional or specific information such as the identity of the union supporters. Finally, over 16 years had passed since the 1998 Teamsters campaign, and the Company had not at that point committed any further unfair labor practices in response to the current BCTGM campaign. On balance, therefore, it is unlikely that White's remarks and questions would have reasonably tended to restrain or coerce an employee in exercising the right to engage in union activity. Cf. *Hancock*, 337 NLRB 1223, 1224 (2002) (reaching same conclusion under similar circumstances). Accordingly, the allegation is dismissed.

The record likewise fails to establish that White unlawfully created the impression of surveillance. An employer's general statements about hearing "rumors" of a union campaign do not create an impression of surveillance absent evidence that the employer could only have learned of the rumor through surveillance. See *South Shore Hospital*, 229 NLRB 363 (1977), and cases cited there.[33] There is no such evidence here. Accordingly, this allegation is dismissed as well.

[31] I credit Phipps' uncontroverted testimony in this regard (Tr. 499). Phipps also denied ever speaking to Manning specifically about the union campaign (Tr. 613–615) and Manning confirmed this (Tr. 970).

[32] At the hearing, Phipps testified that he was also concerned about White's questioning because White reported to Shipping Supervisor Myers, who was known to be very antiunion (Tr. 499).

[33] *Flexsteel Industries*, 311 NLRB 257 (1993), cited by the General Counsel, is inapposite. In that case, the Board distinguished *South Shore Hospital* and found a violation because the employer's personnel manager twice stated to an employee that he had heard rumors about that employee's union activity, and the statements were accompanied by unlawful interrogations and implicit threats. As indicated above, White's reference to "rumors" concerned the union campaign generally rather than Phipps' own union activities, and his accompanying questions did not constitute unlawful interrogation.

2. January 28 conversation (Myers)

The General Counsel also alleges that, on January 28, shortly after the town hall meeting, Outbound/Shipping Supervisor Myers unlawfully interrogated Wallace about his union sympathies (GC Exh. 1(g), par. 5(i).)

Wallace is a warehouse loader who had worked at the Phoenix facility for a little over 6 years, since May 2008. He had not been aware of the union campaign prior to the January 28 town hall meeting, but signed a union card later that evening at a local Denny's restaurant. Myers is an admitted supervisor and directly supervised Wallace.[34]

The subject conversation occurred about 30 minutes after the town hall meeting ended. Wallace was working at the loading dock door, when Myers walked up to him and asked what he thought about the union. Wallace replied that he had talked to his dad, a neighbor, and a Sysco Driver and they said that union workers have better benefits, but he was going to do his own research. Myers nodded his head in agreement and walked off.[35]

Unlike White's previous conversation with Phipps, the balance of relevant factors supports the allegation that this conversation was coercive and unlawful. Myers was Wallace's immediate supervisor, he purposefully approached Wallace at his work station and questioned him directly about his personal views of the union, and he did so shortly after a formal meeting with all of the warehouse employees where a high-level corporate official expressed opposition to the union and unlawfully threatened employees with reduced benefits if they supported it. Further, Wallace, who was not an open union supporter, gave Myers a noncommittal response. Cf. *Intertape Polymer Corp*., above (finding a violation under similar circumstances).

3. January 28 incident at Denny's (Manning)

The General Counsel also alleges that, later that evening, Floor Captain Manning engaged in surveillance of the employees' union activities at the local Denny's restaurant (GC Exh. 1(g), par. 5(j)).

As discussed above, the union campaign was still covert at the end of January. Phipps was meeting with small groups of employees at that time, but only organizing-committee members and employees they were sure supported the Union were invited. One such meeting was held at a local Denny's restaurant about a quarter mile from the warehouse on the evening of January 28. Phipps and two union representatives arrived at around 5:30 p.m., and about five to six warehouse employees showed up between 6:30 and 7 p.m. They all sat a table in the very back that was not visible from the lobby.

[34] As with Engdahl, Wright, and Vaivao, the Company denied in its answer that Myers was a supervisor, but stipulated to his supervisory status at the hearing.

[35] I credit Wallace's testimony about the conversation (Tr. 646–650). Myers admitted that he stopped and talked to employees while making his daily rounds on the dock after the meeting. Although he testified that he only asked employees if they had any questions about the meeting, he could not recall his conversation with Wallace; indeed, he could not recall whether he even spoke to Wallace. (Tr. 863–864, 867.)

Phipps stayed until about 7:30 p.m. As he was going out the door, he ran into Manning, who, as found above, is a company supervisor. Manning was standing on the handicapped ramp outside the front of the restaurant talking to an employee who had just signed a card. Phipps was surprised to see Manning there, as directions had been given not to invite captains to the meetings.[36] And there is no credible evidence that anyone had done so, or that Manning was at Denny's for any reason other than to gather information about the meeting.[37]

It is unlawful for a manager or supervisor to go to an offsite location such as a restaurant without an invitation or any other legitimate justification to observe employees' union activities during nonworking time. See, e.g., *Ivy Steel & Wire, Inc*., 346 NLRB 404 (2006); *North Hills Office Services*, 344 NLRB 1083, 1095 (2005); and *Munsingwear, Inc*., 149 NLRB 839, 846 (1964) and cases cited there. As indicated above, the record evidence indicates that that is precisely what Manning did.[38] Accordingly, his conduct violated the Act as alleged.

4. April 27 conversation (Manning)

The General Counsel also alleges that, a few months later, on April 27, Manning unlawfully created the impression of surveillance by telling Phipps that the Company knew he had recently announced the union campaign in the breakroom, and that he had better watch his back because the Company was watching him.[39]

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[36] The foregoing findings are based on the credible testimony of Phipps (Tr. 518–520, 597) and Wallace (Tr. 651–652), who as mentioned above was one of the employees who attended and signed a card at the meeting.

[37] I discredit Manning's testimony that he was "asked by a couple employees . . . would [he] go to the meeting" and that all he knew was that it had "something to do with work" (Tr. 967–968). First, Manning never identified who those employees were. Second, while Manning had met with Phipps offsite to discuss work issues in the past, he admitted that unions were never discussed at those meetings and that Phipps himself did not tell him about the January 28 organizing meeting (Tr. 973). Third, Lerma, who was on the organizing committee and also attended the January 28 meeting, credibly testified that he likewise did not invite Manning (Tr. 834). Fourth, there is no evidence that Manning had ever expressed support for a union; indeed, the record indicates he was strongly opposed to a union. See Manning's testimony, Tr. 969 ("[the employee I spoke to outside Denny's] asked me, 'Are you in the union or out?" And I said, 'Hell, no.'"). Finally, as indicated above, word of the organizing campaign was spreading "like wildfire" at that time. And Manning admitted that he himself had been hearing "a lot of talk on the docks about meetings and this and that" (Tr. 972). In sum, based on the record as a whole, I find that it is more likely that Manning overheard discussion on the docks that there would be a union organizing meeting at Denny's that evening, and that, in light of the Company's antiunion town hall meeting that morning, he went to Denny's to see what he could see.

[38] *Music Express East, Inc*., 340 NLRB 1063, 1076 (2003), cited by the Company, is therefore plainly distinguishable on its facts.

[39] The complaint alleges that Manning's statements violated Section 8(a)(1) of the Act because the first statement constituted surveillance and the second statement constituted a threat of unspecified reprisal (GC Exh. 1(g), par. 5(s)). However, at the end of the hearing, the General Counsel clarified that Manning's first statement to Phipps was being alleged as unlawful on the theory that it created the impression of surveillance (Tr. 971). And the General Counsel's

As discussed above, Phipps publicly announced the union campaign in the breakroom on April 26 and 27. On the latter date, both Warehouse Manager Vaivao and another manager were present in the breakroom during at least part of the announcement. A while later, after Phipps had returned to work on his forklift, Manning came by in a cart and asked Phipps if it was true, what he announced in the breakroom. Phipps replied that he could not talk about it during work. Manning said, "just watch yourself, because they [are] watching both of us, so watch your back." Manning then turned around and left.[40]

As indicated by the Company, Manning's initial query reflecting awareness of Phipps' announcement could not by itself reasonably create an impression of surveillance given that Phipps made the announcement openly in the company breakroom, managers were present at the time, and there is no contention that they should not have been. See *Sunshine Piping, Inc*., 350 NLRB 1186 (2007), and cases cited there. However, as indicated by the General Counsel, Manning's follow-up statement warning Phipps to "watch yourself" and "watch your back" because the Company was watching, clearly did create the impression of surveillance. Accordingly, it was coercive and unlawful. See *Woodcrest Health Care Center*, 360 NLRB No. 58, slip op. at 1–2 (2014), enfd. in relevant part 784 F.3d 902, 917–918 (3d Cir. 2015).

5. April 29 incident (Remblance)

The General Counsel also alleges that, on April 29, a few days after Phipps announced the union campaign in the breakroom, Safety Manager Remblance unlawfully surveilled and interrogated Phipps and another employee while they were on break (GC Exh. 1(g), par. 5(u)).

The incident occurred at about 1 p.m., a normal breaktime for Phipps and other employees. Phipps and another senior employee on the first shift were talking in one of the aisles, which was not unusual as employees could take a break wherever they wanted. Remblance, who was about 60–70 yards away walking towards his office, noticed them and

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posthearing brief argues that both statements were unlawful on this theory, apparently abandoning the theory that the second statement was a threat of reprisal. While such shifting theories are certainly not to be encouraged, given that the complaint allegation here involves a single, short conversation, which was fully litigated and would likely have been litigated just the same regardless of the theory, I find that the Company has not been deprived of due process. See *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 4 (2015) (finding that supervisor's statements to an employee violated Section 8(a)(1) on the ground that they were coercive, regardless of whether they constituted an unlawful interrogation as alleged in the complaint).

[40] I credit Phipps' testimony about the conversation (Tr. 545–546, 555, 619). Manning testified that he could not remember whether he had such a conversation with Phipps, but denied that he ever told Phipps to watch his back (Tr. 970). The Company argues that this testimony reflects well on Manning's credibility; specifically, that Manning's "acknowledge[ment]" that he could not remember the conversation shows that he was a "credible and forthright witness" (Br. 28). However, the Company offers no plausible explanation for Manning's failure to remember whether he had a conversation with Phipps about his union campaign announcement less than 5 months earlier, and no such explanation is readily apparent. Further, as noted above, Manning's testimony on other matters was inconsistent and clearly contrary to the record as a whole.

came over.[41] He asked each of them if they were on break. They both said yes. Remblance asked what they were talking about. Although they had been talking about Phipps' involvement in the union campaign, they just told Remblance they were talking about work. Remblance then tried to make small talk, but they made it clear they were not interested. So Remblance started to walk away. However, before he left, he turned and asked Phipps how much time he had left on his break. Phipps looked at his phone and said a couple more minutes. Remblance told him to be sure to get back to work when his break was over.[42]

Phipps acknowledged in his pretrial affidavit (R. Exh. 1, p. 42–43), that Remblance had come up and joined conversations between him and other employees in the past. However, the circumstances indicate that that was not Remblance sole or primary reason for coming over; rather, he came over to find out if they were on break and what they were talking about. Further, it is undisputed that, as safety manager, Remblance was not in Phipps' direct supervisory chain and had never monitored his break time in the past. And there is no apparent reason in the record why Remblance would have done so in this instance other than Phipps' recent announcement about the union campaign in the breakroom. Indeed, as discussed below, the evidence indicates that other company managers and supervisors likewise took a number of other, unlawful actions to monitor and interfere with the union campaign. Accordingly, a preponderance of the evidence supports the allegation that Remblance's conduct constituted unlawful surveillance. Cf. *Hawthorn Co*., 166 NLRB 251 (1967), enfd. in relevant part 404 F.2d 1205 (8th Cir. 1969) (foreman engaged in unlawful surveillance by adopting a practice during the union campaign of sitting at employee tables in the cafeteria instead of the foremen's table during coffee breaks, assertedly to ensure they did not go over their break time).[43]

The related interrogation allegation presents a somewhat closer question. Although Remblance asked what they were talking about, he did not specifically refer to the union campaign. Further, Phipps was an open union supporter at that point. However, considering the timing—just 2 days after Phipps' announcement, and a few hours after the antiunion communication meeting where Operations VP Engdahl made several unlawful statements to Phipps and other first-shift senior employees—and the unlawful context discussed above, it is likely that Remblance's question would have reasonably tended to chill employees in the exercise of their union activity. Accordingly, a preponderance of the evidence supports this allegation as well. Cf. *Classic Sofa, Inc*., 346 NLRB 219, 235 (2006) (given the employer's various antiunion statements, the company president unlawfully created an impression of surveillance and interrogated an employee a week before the union election by noting that two other employees had been talking a lot and asking if she knew what they were talking about).

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[41] Like several of the other named managers, the Company denied in its answer that Remblance was a statutory supervisor, but stipulated to his supervisory status at the hearing.

[42] I credit Phipps' testimony about the incident (Tr. 551–553, 620). Although his testimony is not corroborated (the other employee did not testify), it is also not controverted (Remblance, who no longer works for the Company, likewise did not testify). Further, it is consistent with his pretrial affidavit (R. Exh. 1, p. 42–43), and the Company does not cite any reason why it should not be credited.

[43] *Airport 2000 Concessions, LLC*, 346 NLRB 958 (2006), cited by the Company, is distinguishable as the Board found that the supervisor there did not engage in any "out-of-the-ordinary" type of conduct.

6. May 1 incident (Garcia)

The General Counsel also alleges that a few days later, on May 1, Inbound/Receiving Supervisor Garcia unlawfully engaged in surveillance and created the impression of surveillance by searching Lerma's forklift for union authorization cards and subsequently telling Lerma that he knew that Lerma had passed out a card in the breakroom and that he had searched Lerma's forklift to find union cards (GC Exh. 1(g), par. 5(v)(1), (2)).[44]

Lerma is a second-shift forklift operator and member of the union organizing committee. He signed a union card on January 2, and began gathering signatures from other employees in February. Garcia is currently his direct supervisor. Garcia has worked at the warehouse for 27 years, and has known Lerma for about 6 years. He became the outbound supervisor around mid-2013 and the second-shift inbound supervisor in February 2015, and has seen Lerma basically every day he worked since.[45]

The May 1 incident occurred during a lunch break while Lerma was in the receiving office. He had parked his forklift just outside the breakroom, and could see it through the large office window. The forklift had an ID number on it (C18) and was typically assigned to him every day. He had also left his clipboard on top of the forklift, which he had purchased himself and had various documents clipped to it, including his pay sheets, drop notes, and work-hour calculations for the week. A copy of the day's schedule, which was prepared by the first-shift inbound supervisor and showed where all the employees were assigned, was also in a cubbyhole on the forklift.

At some point, Lerma glanced out the window and noticed that Garcia was leaning over the forklift with Lerma's clipboard in his hands and was leafing through the documents. Lerma immediately went out and confronted Garcia, asking him what he was looking for. Garcia said he was looking for the schedule and walked away. However, Lerma did not believe him because the schedule was in plain view sticking out of the cubbyhole and was not on the clipboard. Further, while Garcia had authority to adjust the schedule and move employees around, he could access the schedule on his office computer and had never asked to see Lerma's copy of the schedule before. Accordingly, when Lerma later saw Garcia again in the deli aisle, he asked Garcia "to be straight" with him and tell him the real reason he was going through his "stuff." Garcia admitted at that point that he was looking for union cards. He said he had gotten a call from transportation that Lerma was putting up flyers and had handed a union card to the transportation clerk in the breakroom.[46]

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[44] The complaint (par. 5(v)(3)) additionally alleges that Garcia unlawfully solicited employee complaints and promised employees increased benefits on May 1. However, the General Counsel's posthearing brief does not address this allegation, and it appears to have been abandoned. In any event, the General Counsel has failed to carry the burden of proof and persuasion.

[45] Tr. 763, 784, 956–958. The Company stipulated at the hearing that Garcia is a statutory supervisor.

[46] I credit Lerma's testimony about the incident (Tr. 807–814, 836–838, 851– 856). See also GC Exh. 28(a), (b) (pictures of where his forklift was parked). Although Garcia testified to the contrary in virtually every detail, he was not a credible witness. For example, notwithstanding that the forklift drivers are usually assigned the same forklift every day and that he had directly

There is no contention or evidence that Lerma had violated a lawful company rule or policy by distributing a union card in the breakroom. Nor is there any contention or evidence that the Company had a non-discriminatory policy and practice of searching forklifts or clipboards for nonwork related items. Accordingly, Garcia's foregoing conduct was clearly coercive and violated the Act as alleged. See, e.g., *Intermedics, Inc*., 262 NLRB 1407, 1415 (1982), enfd. 715 F.2d 1022 (5th Cir. 1983); and *Clark Equipment*, 278 NLRB 498, 503–504 (1986). Compare *Bellagio, LLC*, 362 NLRB No. 175 (2015) (no violation found where the employer had legitimate cause, based on the employee's violation of company policy regarding protection of client credit card data, to review her work email account to determine whether she also had committed other similar violations); and *Stanley M. Feil, Inc*., 250 NLRB 1154 (1980) (no violation found where the employer had a pre-existing legitimate rule and practice of searching purses and bags when employees exited the facility during lunch break).

7. May 5 meeting with Lerma (Engdahl and Vaivao)

The General Counsel also alleges that, several days later, on May 5, Operations VP Engdahl and Warehouse Manager Vaivao called Lerma up to the office and made various statements to him that unlawfully created the impression of surveillance of his union activities, promulgated an overbroad and discriminatory rule prohibiting him and other union supporters from heckling or insulting employees, and threatened him with unspecified reprisals for doing so (GC Exh. 1(g), par. 5(w)).[47]

The subject meeting, which Lerma secretly recorded, occurred at the beginning of his shift. Upon arriving at the warehouse, a supervisor informed Lerma that Vaivao wanted to see him upstairs in his office. When Lerma got there, Vaivao told him that Engdahl wanted to talk to him, and walked him across the hall to Engdahl's office.[48] After completing a phone call, Engdahl introduced himself to Lerma and explained why he had been called up. He said,

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supervised Lerma on the warehouse floor for the previous 3 months, he denied that he had any idea it was Lerma's forklift and clipboard he was looking through (Tr. 947). He also denied that he carries his own copy of the schedule, notwithstanding that he distributes the schedule to the employees, regularly "tweaks" it by shuffling employees around two to three times every shift, and his office computer is far away on the opposite side of the warehouse (Tr. 947–949). Indeed, during cross-examination on another point, Garcia let slip that he had "just distributed the schedule" prior to looking through Lerma's clipboard (Tr. 963). Moreover, given the Company's hostility to the union campaign, other unlawful conduct discussed herein, and subsequent actions against Lerma (see the next section below), it is not difficult to believe that Garcia would have been looking for union cards on Lerma's forklift or clipboard. Nor is it too difficult to believe, given that Garcia had known Lerma for so many years and had apparently not been a supervisor for the vast majority of his 27-year career, that he would have admitted privately to Lerma that that was the real reason he was looking through Lerma's clipboard when Lerma continued to question him about it.

[47] The complaint also separately alleges (par. 6) that the Company unlawfully disciplined Lerma at the May 5 meeting. This allegation is addressed in section C.2 below.

[48] See Tr. 742 (Engdahl's warehouse office is located directly across from Vaivao's office).

> I wanted to talk to you today because there's been let's just say some rumblings coming off the floor. Okay. And I'm doing this more as a heads-up to you, okay, as wanting you to kind of take note and stay out of trouble. Okay.
>
> The words that have come off the floor are that there's some hecklings going on, some insulting going on, and some potential slowdown on certain folks who are not sharing a similar point of view. Okay. So I . . . want you to be aware of that. It has come to our attention, okay. And I want you to understand our position would be that that won't be tolerated. Okay. And you could get in some serious trouble for that. We want to try to avoid that. Okay.
>
> So I'm . . .speaking as generically as I can, but I'm sure you understand what I'm trying to say and . . . you know, we . . .want to avoid problems that we don't need to have. That's all I'm saying. Okay. And I'm trying to speak as nicely as I can and, you know, at least get the message across, right.

Lerma replied that he was just doing his own research like Engdahl had told him to do in the town hall meeting, because what the Company was saying and what other guys were saying about unions conflicted, and a lot of people asked his opinion. Lerma complained that he felt like he was being pulled aside by management and "put in hot water" for "spreading rumors" whenever he tried to express his opinion, even if it was on break or outside the Company.

Engdahl said Lerma was entitled to express his opinion, and hoped he did not "scare the shit out" out of Lerma by "bringing him up" to his office. He then offered to "help clarify," saying,

> It's okay to express your opinion, okay, but the part that wouldn't be okay is if it was done in such a way where somebody could perceive it as intimidation, or something like that, right? It's kind of how you do it, if that makes sense, right? Maybe—just think about that when you are expressing your opinion as to how you're doing it and what not, because maybe—you know, I'm not saying this is the case, but maybe if that feedback is coming around somehow they are being—you know, . . . feel threatened or intimidated. That's all I'm saying. I don't know.

Vaivao then spoke, explaining why he had previously "followed up" and "talked" with Lerma about expressing his opinions. He said he had done so because employees had told him that Lerma was the one who told them things about the Company's new pay plan, and the employees were concerned about it and brought it up to him. And employees were now telling the Company again that Lerma was "the local voice out there . . . telling [his] opinion in front . . . of the guys." Vaivao said,

> So that's what we're hearing . . . all right. We're hearing that, hey, Lerma was doing this. All right. . . . Like Mark [Engdahl] said, we just got to make sure that we're not doing those type of things up there. We're not . . . heckling guys out there. We're not slowly . . . not bringing fork[lifts] down for guys, for certain individuals. All right. . . . If that's the situation, like Mark said, you would be—you would find yourself in some deeper trouble.

Lerma asked Vaivao who his sources were. However, Vaivao declined to say. Engdahl assured Lerma that he was "not getting in trouble right now"; that they were "just talking" to

him. Lerma replied that, nevertheless, to "protect himself," in the future he would just do his work, "stay quiet, don't say shit," and go home. Engdahl said "okay" and reiterated that Lerma was not "getting in trouble." Engdahl said that he was "trying to avoid anybody getting in trouble"; that he "could not afford to lose anybody" and did not "want to have to bring in new people"; that Lerma did a good job and the Company had "a ton of investment" in him by training him over the years; and that the Company would have been "doing [Lerma] a disservice not to at least tell [him] what [they] were hearing so that [he was] aware of it." Lerma said "okay, that works," and the meeting ended. (GC Exh. 13(a), (b); Tr. 320–323, 820.)[49]

The General Counsel contends that Engdahl's foregoing statements created the impression of surveillance because he failed to disclose how he acquired information about Lerma's union activities (GC Br. 40). However, both Engdahl and Vaivao indicated that the Company learned about his activities from other employees who had complained about them. Although they did not identify the employees by name, Board precedent did not require them to do so. See the discussion and cases cited in section A.5 above regarding the February 24 union education meeting. Accordingly, this allegation is dismissed.

As indicated above, the General Counsel also contends that Engdahl's statements effectively promulgated a rule prohibiting Lerma and other union supporters from heckling or insulting other employees. The General Counsel asserts that this rule was unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In that case, the Board held that a work rule is unlawful, even if it does not expressly restrict union activity, if (1) employees would reasonably construe it to prohibit union activity, (2) the rule was promulgated in response to union activity, or (3) it has been applied to restrict union activity. The General Counsel argues that the no-heckling or insulting rule was unlawful under the first and second prongs of this test, i.e. because it was promulgated in response to union activity, and/or because such terms as "heckling" and "insulting" are ambiguous and employees would reasonably interpret them to encompass protected union activities. (GC Br. 62 n. 43).

The General Counsel's arguments are well supported. There is no real dispute that Engdahl adopted or announced a rule prohibiting "heckling" or "insulting" coworkers at the May 5 meeting. As indicated above, Engdahl clearly stated that such conduct "won't be tolerated." Further, he did not cite or refer Lerma to any existing rule prohibiting such conduct, and the Company does not contend that there was any such rule.[50]

There is also no real dispute that Engdahl promulgated the rule in response to union activity. Although Engdahl and Vaivao scrupulously avoided specifically mentioning the union

[49] I discredit the testimony of Engdahl (Tr. 742–749) and Vaivao (Tr. 237–249) to the extent it conflicts with the recording and transcript of the meeting. For example, I discredit Vaivao's testimony that Engdahl specifically told Lerma that employees had complained that he had thrown pens at them when they declined to sign a union card.

[50] As discussed in section D.11 below, the Company maintains a rule against "harassment." However, Engdahl did not mention this no-harassment rule at the May 5 meeting, the reported complaints about union supporters were not treated as harassment complaints under that rule (Tr. 144–145, 749, 929–930), and the Company's posthearing brief does not contend it was identical to or fully consistent with Engdahl's rule.

campaign during the meeting, there is no dispute that they were referring to Lerma's prounion opinions and activities, and that everyone in the room understood this.

In these circumstances, the burden was on the Company to demonstrate that the new rule was actually motivated by legitimate workplace concerns apart from the union campaign. *Care One at Madison Avenue*, 361 NLRB No. 159, slip op. at 3 (2014). The Company failed to do so. Although Engdahl and Vaivao offered hearsay testimony that employees complained to them about Lerma and other union supporters throwing pens at them after they declined to sign a card, their testimony was never corroborated.[51] Lerma credibly testified that he did not engage in such conduct (Tr. 815–816, 847), and none of the complaining employees were called to contradict him. Nor was any documentation of the complaints presented. Indeed, Engdahl and Vaivao admitted that none of the complaints were ever investigated or documented (Tr. 749, 929–930). Accordingly, the rule was clearly unlawful under the second prong of the *Lutheran Heritage* test. See *Care One*, above, at n. 6, and cases cited there.

As for the first prong of the *Lutheran Heritage* test, like employer statements generally, both the content and the context of the rule must be considered. Here, as indicated above, the rule prohibited "heckling" and "insulting" coworkers. On its face, such language is at least arguably lawful, i.e. it is not so "imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions or interactions protected by Section 7 [of the Act]" (*2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011)). See *First Transit, Inc*., 360 NLRB No. 72, slip op. at 3 n. 10 (2014) (finding lawful an employer rule that prohibited "abusive language where the language used is uncivil, insulting, contemptuous, vicious, or malicious").

However, Engdahl went further by "clarify[ing]" that such conduct included expressing an opinion in such a way "where somebody could perceive it as intimidation" or "feel threatened or intimidated." It is well established that rules restricting union or other protected activity based on the subjective reactions of others are unlawful. See *Consolidated Diesel Co.,* 332 NLRB 1019, 1020 (2000), and cases cited there. As the court stated in enforcing the Board's decision in that case, "There would be nothing left of Section 7 rights if every time employees exercised them in a way that was somehow offensive to someone, they were subject to coercive proceedings with the potential for expulsion." 263 F.3d 345, 354 (4th Cir. 2001).[52]

Further, Engdahl announced the rule at a time when employees were, in fact, reportedly complaining about being approached by union supporters. As discussed above, Vaivao had reported this to Lerma and other employees at the March 26 union prevention meeting. See sec. II.A.6, above. Moreover, just days before the May 5 meeting, Lerma's immediate supervisor, Garcia, unlawfully searched his forklift for union cards simply because he had been seen handing a card to an employee in the breakroom. In these circumstances, employees would reasonably conclude that the rule was intended to restrict such protected activities. See *Care One*, above,

[51] As noted above, neither Engdahl nor Vaivao specifically mentioned any pen throwing to Lerma at the meeting. Thus, I reject the Company's argument (Br. 18) that Lerma's failure to specifically deny such conduct at the May 5 meeting itself supports Engdahl's hearsay testimony about the complaints.

[52] Although I would reach the same conclusion regardless, Lerma's response to Engdahl (that, to "protect himself," in the future he would just do his work, "stay quiet, don't say shit," and go home) certainly appears to confirm this reasoning.

slip op. at 4; and *Boulder City Hospital, Inc*., 355 NLRB 1247 (2010). See also *Auto Workers v. NLRB*, 520 F.3d 192, 197 (2d Cir. 2008).

Finally, as indicated above, Engdahl warned Lerma that he "could get in some serious trouble" if he violated the rule. Vaivao similarly told Lerma that he "would find [him]self in deeper trouble" if he violated the rule. And, in his subsequent concluding remarks, Engdahl made clear that, by "trouble," they meant Lerma could be terminated. Thus, the evidence likewise supports the allegation that Engdahl and Vaivao unlawfully threatened Lerma with reprisals if he violated the rule. See generally *Waste Management of Palm Beach*, 329 NLRB 198, 200 (1999); and *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403 (1993).

8. May 8 letter to employees (McClelland)

The General Counsel alleges that a few days later, on May 8, Company President/CEO McClelland committed similar violations in a letter to all warehouse employees. The General Counsel alleges that the letter unlawfully promulgated an overbroad and discriminatory rule that requested employees to report, and threatened to legally prosecute, anyone who violated it (GC Exh. 1(g), par. 5(x)).

The letter stated in relevant part as follows:

> To All Associates:
>
> It has come to my attention that some associates have recently been subjected to threatening, violent, or unlawfully coercive behavior by other associates. This is a very serious matter and one that I take personally.
>
> Let me be clear: such behavior is *not* consistent with the Shamrock Foods Company culture and values that are central to us. Shamrock has been in business since 1922, and has *never* tolerated associates behaving towards each other in a manner which is violent, threatening, or unlawfully coercive. Shamrock Foods Company has always celebrated and encouraged the diversity of its associates and will continue to do so. Associates should not be physically afraid of coming to work. We will not allow associates to behave in a manner which violates the law through threats of violence, or unlawful bullying. Simply put, this type of behavior is unacceptable and I will make every effort to stop it at our workplace.
>
> To that end, if you have been the victim of such behavior, in any way, shape, or form, however minor, please promptly report it. Shamrock will fairly and thoroughly investigate all allegations. If the complaint has merit, Shamrock will take appropriate action against anyone threatening associates and refer the matter to law enforcement for prosecution to the fullest extent of the law if that is the right course of action. Each associate is expected to perform their work in a cooperative manner with management/supervision, fellow associates, customers, and vendors. [GC Ex. 14.]

The General Counsel contends that McClelland's foregoing letter promulgated a new rule prohibiting unlawful coercive behavior or bullying. The General Counsel argues that, like

Engdahl's rule, this new rule was unlawful under both the first and second prongs of the *Lutheran Heritage* test because it was promulgated in response to union activity and because employees would reasonably construe it to apply to protected union activity.

Again, the General Counsel's arguments are well supported. The letter clearly stated that unlawful coercive behavior and bullying "was "unacceptable" and would not be tolerated or allowed. Further, like Engdahl, McClelland did not cite or refer employees to any existing rule prohibiting such conduct, and the Company does not contend that there was any such rule.[53]

It is likewise clear that the letter was sent in response to union activity. Although McClelland did not specifically mention the union campaign, as discussed above neither did Engdahl and Vaivao, yet there is no dispute that they were referring to union activity at their May 5 meeting with Lerma. Further, McClelland sent the letter to all the warehouse employees just 3 days later after that meeting. And there is no record evidence of any conduct other than the prounion activity Engdahl and Vaivo discussed with Lerma and other employees at that and other meetings that might have prompted the letter.

Moreover, McClelland's testimony regarding how he came to send the letter is entirely unbelievable. McClelland testified that he had no idea what the reported coercive behavior or bullying was related to. He testified that HR told him that employees had complained of feeling threatened, but he did not recall who in HR told him, did not know any details about what happened, did not know why they felt threatened, and did not think it mattered why they felt threatened. However, he acknowledged that he does not regularly send such letters to employees, and in fact could not specifically recall the last time he had done so. He also admitted that he "chose" to send this one because he felt that it was "imperative" to do so. (Tr. 353–356.) It is inherently unlikely in these circumstances that he would not have asked or been told, at least in general terms, what the alleged threatening behavior was about, before sending the letter.[54]

As discussed above, therefore, it was incumbent on the Company to show that McClelland's new rule was actually motivated by legitimate workplace concerns apart from the union campaign. As with Engdahl's rule, the Company failed to do so. Accordingly, the rule was clearly unlawful under the second prong of the *Lutheran Heritage* test.

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[53] Again, the Company does not contend that McClelland's rule prohibiting unlawful coercion or bullying was identical or consistent with the Company's existing no-harassment rule.

[54] Thus, I find that, in truth, McClelland did ask and/or was told. See *NLRB v. Howell Chevrolet Co*., 204 F.2d 79, 86–87 (9th Cir. 1953), affd. 346 U.S. 482 (1953) (where a tribunal discredits a witness, it may find, "not only that the witness' testimony is not true, but that the truth is the opposite of his story"); and *O'Reilly Auto Parts v. NLRB*, 779 F.3d 576, 585 (D.C. Cir. 2015) (where a witness' testimony is discredited, the "next logical step" is to find that "the truth was the opposite of what he recounted under oath"). The General Counsel also cites the Company's June 8, 2015 position statement (GC Exh. 29, p. 15), which it submitted during the Region's investigation of the allegations, as support for finding that the letter was sent in response to union activity. However, the General Counsel offered the Company's position statement into evidence solely in support of the allegations involving Wallace, and it was therefore received solely for that purpose (Tr. 857). Accordingly, I have not relied on it here.

Regarding the first prong of the test, no case has been cited or found since *Lutheran Heritage* involving a rule that prohibited "unlawful bullying." Like "heckling" and "insulting," this language is at least arguably lawful on its face, particularly where, as here, it is used in the context of discussing "threatening, violent, or unlawfully coercive behavior." See generally *First Transit*, above. However, the circumstances surrounding issuance of the rule must also be considered. And, as discussed above, McClelland announced the rule just days after three of his supervisors or managers had unlawfully discouraged a primary union supporter from continuing to engage in lawful union solicitation by searching his equipment for union cards and warning him that the way he expressed his prounion opinions would be scrutinized under a subjective standard. In these circumstances, an employee would reasonably conclude that, like Engdahl's rule, McClelland's no-unlawful bullying rule would be applied to restrict protected activities. See *Care One*, and *Boulder City*, above.

Finally, given the foregoing, McClelland's letter also violated the Act as alleged by requesting employees to "promptly report" to the Company if they were "the victim of such behavior, in any way, shape, or form, however minor," and by threatening to "refer the matter to law enforcement for prosecution to the fullest extent of the law" if the Company decided the complaint had merit. See *Winkle Bus Co*., 347 NLRB 1203, 1024 (2006); *Ryder Truck Rental*, 341 NLRB 761 (2004), enfd. 401 F.3d 815 (7th Cir. 2005); and *Tawas Industries*, 336 NLRB 318, 322 (2001).

9. May and June breakroom incidents (Garzon)

The General Counsel also alleges that Sanitation Supervisor Garzon committed a number of unfair labor practices in May and June. Garzon had been the sanitation supervisor at the warehouse for about 2 years, and supervised around 20 employees.[55] The General Counsel alleges that she unlawfully took union flyers away from and interrogated two of those employees in the breakroom, and also unlawfully removed union literature from the breakroom information counter (GC Exh. 1(g), pars. (y), (aa)).[56]

Phipps began handing out union flyers at the warehouse near the end of May. On May 25, he was in the upstairs breakroom doing so when he noticed that Garzon was standing at a table where he had placed flyers in front of two of the sanitation employees. As he watched, Garzon reached down and took both of the flyers off the table. Phipps immediately walked over and confronted her, saying she could not do that; it was a violation of their rights unless they gave her permission to take the flyers. Garzon did not respond, but looked at the employees and

[55] As with all of the other managers and supervisors identified in the original complaint, the Company denied in its answer that Garzon was a supervisor, but stipulated to her supervisory status at the hearing.

[56] The complaint alleges that Garzon also unlawfully removed union flyers from the breakroom on July 8. However, there is no specific record evidence of this and the General Counsel's posthearing brief appears to have abandoned the allegation. The complaint additionally alleges that the Company maintains an overbroad no-solicitation/distribution rule generally. This allegation is addressed in section D.12 below.

said, "Well, you guys don't want these, do you?" Both of the employees shook their heads no, and she walked off with them.[57]

Phipps also left union flyers on an "information counter" that the Company maintains in the breakroom. The counter is used by the Company for displaying or distributing health and fitness information. Employees also occasionally place business cards and notices advertising items for sale on the counter, but Garzon immediately removes them.[58] On at least three occasions, Garzon likewise removed the union flyers that Phipps had placed on the counter (Tr. 878). On one of those occasions in June, Phipps actually videotaped her doing so with his cell phone camera. The video shows Garzon entering the breakroom, walking directly to the counter, picking up the union flyers, and immediately walking out with them (GC Exh. 24).

It is well established that an employer may not prohibit distribution of union literature by employees during nonwork time in nonwork areas absent a showing of special circumstances that make prohibiting the distribution of literature necessary to maintain production or discipline. See *Our Way, Inc*., 268 NLRB 394 (1983); and *Stoddard-Quirk Mfg*., 138 NLRB 615 (1962). The Company made no such showing here; indeed, it does not even contend that there are any special circumstances justifying a rule against distributing union flyers to employees in the breakroom. Moreover, as indicated by the General Counsel, it is unlawful under extant law for an employer to confiscate union literature even if it could lawfully prohibit distribution of it. See *Manorcare Health Services-Easton*, 356 NLRB at 206; and *Hanson Aggregates Central, Inc*., 337 NLRB 870, 875–876 (2002). Thus, for either or both of these reasons, Garzon clearly violated the Act by taking the flyers from the two employees in the breakroom.

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[57] I credit Phipps' testimony about this incident (Tr. 554–558, 625–626, 630). It was corroborated in substantial part by Garzon herself, who admitted that she picked up both of the flyers; that Phipps approached and said she was not supposed to do that; that she asked the employees if they wanted them back and they said no; and that she then walked off and threw the flyers away (Tr. 872–877, 883–884). Although Garzon testified that she initially took one of the flyers only because it was in English and the employee asked her to translate it in Spanish for her, I discredit that testimony. According to Garzon, she already had her own copy of the flyer (Tr. 873). Thus, there was no need to take the employee's copy to translate it. Further, as indicated above, Garzon also took the other employee's flyer. Finally, Garzon admitted that she refused to translate the flyer for the employee because it was a union flyer (Tr. 874).

[58] Tr. 558, 634–636, 881–883. Phipps testified that other "things" are also frequently put on the counter, such as drinks, chips, water bottles, milk crates, and even hula hoops (Tr. 634–635). However, he did not say who put them there or why. Further, although he said he had a picture of the counter with one or more of these items on it, no such picture was offered into evidence. Nor did any other witness corroborate his testimony. Accordingly, I find that the General Counsel failed to establish that employees regularly placed items on the counter that were not immediately removed by Garzon or the sanitation employees.

Phipps also testified that he had never noticed Garzon pick things up in the breakroom before (Tr. 636). However, it seems unlikely that Garzon, who had also been a cleaner for 10 years before she became the sanitation supervisor, would not have done so. In any event, the General Counsel's posthearing brief does not cite or rely on Phipps' testimony in this respect as support for the allegations.

Considering all the circumstances, particularly the fact that she was their direct supervisor, Garzon also clearly violated the Act as alleged by asking the two employees if they wanted the union flyers back. See *GC Murphy Co*., 213 NLRB 175, 176–177 (1974) (store managers unlawfully interrogated employees by asking what they planned to do with the literature a union agent had given them and to turn it over to the company); and *St. Francis Medical Center*, 340 NLRB 1370, 1382 (2003) (hospital security guard unlawfully interrogated employees by asking them if they were going to read the union flyer they had received or going to keep it, and to give it to him).

However, the evidence fails to establish that Garzon likewise violated the Act by removing the flyers from the company information counter. It is well established that an employer may lawfully reserve breakroom bulletin boards for company information only (*Walmart Stores, Inc.,* 340 NLRB 703, 709–710 (2003)), and no case has been cited or found indicating that an employer may not likewise reserve a breakroom counter. Although an employer may not disparately enforce such a policy by permitting employees to display some information but not union information (ibid.), contrary to the General Counsel's contention, there is no direct or substantial evidence that the Company did so.[59] As indicated above, the counter was maintained by the Company solely to display information on health and fitness, and other information placed there by employees was routinely removed.[60] Accordingly, this allegation is dismissed.

[59] In arguing to the contrary, the General Counsel's posthearing brief cites: (1) Phipps' videotape of Garzon removing the union flyers; and (2) Lerma's testimony that the employees sell Girl Scout cookies and fundraise for their children's sports teams on the work floor (Tr. 780). I agree that Phipps' videotape is strong evidence that Garzon went into the breakroom solely to remove the union flyers. Based on the videotape and the record as a whole, I therefore discredit Garzon's testimony (Tr. 884–888) that she did not go there on that occasion to look for or remove the flyers, and that she was just checking the entire breakroom as usual to make sure it was clean. I also agree that Lerma's testimony indicates that the Company might not have strictly enforced its no-solicitation/distribution rule in certain respects on the work floor (Lerma did not say whether any managers or supervisors were present or aware of the employee solicitation on the work floor). However, neither is sufficient to satisfy the General Counsel's burden to establish that removing the union flyers from the company information counter was contrary to past practice or otherwise discriminatory. See *Wal-Mart Stores*, above. Compare *Intertape Polymer Corp*., 360 NLRB No. 114 (2014) (finding violation where evidence established that literature, such as newspapers, magazines, etc., had previously remained untouched in the breakroom until at least the end of the workday, but during the union campaign supervisors monitored the breakroom much more closely and began removing all literature, including union literature, shortly after employees finished their breaks), enfd. on point 801 F.3d 224, 232–233 (4th Cir. 2015).

[60] There is no reference to use of the breakroom counter in the company no-solicitation/ distribution rule, or any other documentary evidence in the record of the Company's restriction on its use. However, it is not necessary that such a restriction be in writing. See *Walmart Stores*, above. And the General Counsel's posthearing brief does not contend otherwise.

10. May 29 wage increase

The General Counsel also alleges that, about May 29, the Company unlawfully gave a wage increase to some of the warehouse employees to dissuade them from supporting or voting for the Union (GC Exh. 1(g), par. 5(z)).

The Company granted or announced wage increases for four groups or classifications of warehouse workers in May: will call ($2/hour, retroactive to beginning of pay period), returns ($2/hour), sanitation ($1/hour), and throwers ($1/hour, likewise retroactive). Such wage increases for warehouse employees were rare; increases normally ranged between 3–5 percent. And the Company had never granted a retroactive wage increase in the previous 20 years.[61]

As previously discussed in section A.7 above, an employer violates Section 8(a)(1) of the Act by promising or granting a benefit during a union campaign in order to dissuade its employees from supporting the union. The evidence strongly supports an inference that this was the Company's motive for granting or announcing the May wage increases. As discussed above, HR Director Wright and Warehouse Manager Vaivao had unlawfully solicited employee complaints regarding their wages at the roundtable and communication meetings on January 28 and February 5. Moreover, at the recent communication meeting on April 29, Operations VP Engdahl had specifically reminded employees, after making various unlawful promises and threats, that it was "the company" that pays wages, "not the union." See sec. A.2, 3, and 7 above. Granting a substantial number of the warehouse employees extraordinary and unprecedented retroactive wage increases just a few weeks later not only proved, but emphasized the point. It also, of course, suggested "a fist inside the velvet glove," and thereby fit well with the Company's other unlawful antiunion conduct.[62]

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[61] The foregoing findings are based on the credible and corroborative testimony of Phipps (Tr. 559–561 and Lerma (Tr. 781, 843). Both are in a different classification or position (forklift operator), and their testimony about most or all of the wage increases was hearsay, based only on what they had been told by the employees who received them. Nevertheless, I have given this secondary evidence substantial weight in light of the Company's failure to make a good-faith effort to timely comply with the General Counsel's subpoena request for the relevant payroll records (GC Exh. 2(e), attachment 1, par. 52). See fn. 29 above, and cases cited there. See also Tr. 911–927 (further discussing the evidentiary sanctions with respect to the wage-increase allegation), and Company counsel's on-the-record statements, Tr. 94 [day 2] ("[A] lot of these we could . . . probably just stipulate to . . . I don't think there's a question that there was a pay raise granted on a particular date"); Tr. 563–564 [day 5] ("without . . . having spoken to the client yet, I believe the General Counsel is correct. . . . I don't believe there is a dispute over whether there was an increase"); Tr. 564–565 [day 5] ("I'm not aware of the dispute on [the date of the increase] . . . and to the best of my knowledge, I think those amounts are correct, but I would have to double-check"); and Tr. 916 [day 7] ("there are documents that say . . . this is the wage increase and stuff").

[62] See *NLRB v. Exchange Parts Co*., 375 U.S. 405, 460 (1964) ("The danger in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."). The General Counsel's posthearing brief does not request an adverse inference of an unlawful motive based on the Company's failure to produce documents responsive to paragraphs 52–54 of the subpoena duces

Nevertheless, the Company argues that the allegation must fail for two reasons. First, it argues that the wage increase cannot be found unlawful because no election petition was pending, and the Company therefore had no knowledge at the time which employees the Union had targeted in its organizing effort. The argument is without merit. See *NLRB v. Curwood, Inc*., 397 F.3d 548, 553–557 (7th Cir. 2005) (affirming Board's finding that the employer's pre-petition announcement of benefits was unlawful where the employer was admittedly aware of the union campaign at the time), and cases cited there.[63] As in *Curwood*, there is no dispute here that the Company knew about the union organizing campaign among the warehouse workers at the time it granted the wage increases. Nor is there any evidence or contention that the Company had reason to believe that the campaign excluded warehouse workers in the will call, returns, sanitation, and thrower positions.

Second, the Company argues that no violation can be found because the Union's campaign was not active at the time that the wage increases were granted. This argument is likewise without merit. There is no evidence that the union campaign was not still active during and after May 2015. On the contrary, as discussed earlier, Phipps began openly distributing union flyers at the warehouse at the end of May. And both he and Lerma continued to do so in June. (Tr. 554, 565, 630, 787–788, 846.) Thus, there was no reasonable basis for the Company to conclude that the union campaign was dormant at the time of the wage increases. Cf. *Sigo Corp*., 146 NLRB 1484, 1486 (1964) (reaching contrary conclusion where the union had withdrawn its petition without explanation and there was no evidence of any organizational activity thereafter).

In arguing otherwise, the Company relies solely on a pretrial affidavit that Phipps gave to the NLRB Regional Office on May 21 during its investigation of the Union's unfair labor practice charges. The Company asserts that Phipps' affidavit admitted that the union campaign was essentially dormant at that time. However, the affidavit contained no such admission. Indeed, it stated that a union meeting had been held just 2 days earlier, on May 19. Although the affidavit stated that fewer employees attended the meeting, that only four additional cards had been signed in the previous 30 days, and that the campaign was "pretty much stalled," it explained that this was "due to the [Company's] constant efforts to interrogate employees about if we are for or against the union and the fact that supervisors are constantly surveilling us." (R. Exh. 1, pp. 52–53.)

In any event, there is no record evidence or contention that the Company was provided a copy of Phipps' affidavit before it granted the wage increases. The NLRB's policy and practice is not to provide a respondent with such a pretrial affidavit unless and until the witness has testified for the General Counsel or the charging party at the hearing. See Sec. 102.118(b)(c) and (d) of the Board's Rules; and *H.B. Zachry Co*., 310 NLRB 1037 (1993).

Accordingly, the wage increases violated the Act as alleged.

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tecum. In any event, given the substantial record evidence of the Company's unlawful motive discussed above, it is unnecessary to draw or rely on such an adverse inference.

[63] See also *Hampton Inn*, 348 NLRB at 17 (the rule regarding a promise or grant of benefits during an organizing campaign applies even if no representation petition has yet been filed).

C. Alleged Unlawful Discharge and Discipline

1. Thomas Wallace

The General Counsel alleges that the Company violated Section 8(a)(1) and (3) of the Act by discharging Wallace on April 6 because he complained at a March 31 company meeting about the Company's health benefits and/or because he supported the Union, and to discourage other employees from engaging in such activities. The General Counsel also alleges that the Company violated Section 8(a)(1) of the Act by presenting a separation agreement to Wallace at the time of his discharge that included certain overbroad provisions.[64] (GC Exh. 1(g), par. 5(a), (p) – (r), and GC Exh. 1(m), par. 6(b); Tr. 699–700.)

a. The discharge

As discussed in section B.2 above, Wallace is a warehouse loader who had worked at the Phoenix facility for over 6 years and signed a union card at the Denny's meeting on January 28. There is no evidence that Wallace passed out union flyers or otherwise openly campaigned for the Union at the facility.[65] However, as indicated in section A.1 above, he was the first employee to speak up when Engdahl opened the floor to questions at the January 28 town hall meeting, asking why Shamrock's competitors were unionized (GC Exh. 8(a), at 12–13.)

Wallace also asked a few questions at a mandatory "state of the company" meeting with all of the warehouse workers and managers on March 31. The meeting was conducted by Robert Beake, the Company's senior vice-president for HR. Beake had served in that position for 14 years, and reported directly to both President/CEO Kent McClelland and his father, Norman McClelland, the chairman of the board.

Like the January 28 town hall meeting, the meeting was secretly recorded by Phipps. Beake began by saying that neither of the McClellands could be present at the meeting, but that he would play a recorded message from each, one from Kent "in the beginning" and one from Norman "at the end." He then played the message from Kent. It summarized the Company's "tremendous growth" and "wonderful results" during the previous year, thanked the employees for their contribution, and listed the topics for the meeting (the company's stock and retirement programs, changes in HR, and other "things that affect [employees] directly and personally").

Beake then discussed these points in more detail. He noted that, although the Company was still privately held and family owned, it had around $3 billion in sales the previous year, and an annualized growth of over 8 percent over the previous 30 years, which was "incredibly impressive" for the industry. He also said that the Company expected "some incredible numbers" in 2015, including $300 million in sales from just one of the Company's newer food

[64] Although the complaint alleges that the provisions were also discriminatory, the General Counsel's posthearing brief argues only that they were overbroad, and thus appears to have abandoned the theory. In any event, the General Counsel failed to carry the burden of proof and persuasion.

[65] Phipps testified that Wallace brought the Union three signed cards and was outspoken about the benefits of the Union (Tr. 606). However, this testimony was not corroborated and the General Counsel's posthearing brief does not mention or rely on it.

service operations in California. He said that all of the profits are put back into the Company to continue its growth. However, he noted that a substantial number of employees were stockholders and had benefited from the large increase in the Company's stock price. He also discussed various employee benefits offered by the Company. He noted, for example, that the Company continued to contribute half of the employee deductible under the Company's wellness and healthcare plans, and also continued to offer a 401(k) match and profit sharing.

Beake then introduced Vince Daniels, the Company's new vice president for HR. Daniels had been hired 6 months earlier, in August 2014, and reported to Beake. Daniels briefly summarized various changes in HR and employee services, including a new internet based portal for employees to access 24/7.

Beake then "close[d]" by playing a recorded message from Norman McClelland. The message reiterated how much the Company was progressing and gaining in market share. It also again thanked the employees for their part, saying that the Company "value[d]" them and wanted to treat them "like family."

When the message was finished, Beake repeated that it "close[d] out what [the Company] wanted to convey" to the employees at the meeting. However, he added that there was "a little bit of time . . . to take some questions if [they had] any." An employee then asked a few questions about the healthcare plan; specifically, about getting a medical discount card and whether the deductible had gone up.

After these two initial questions had been answered, Beake asked if there were any other questions. Wallace at that point raised his hand and said, "Yeah. Is there any way we can get our old insurance back?" This question was immediately greeted with a burst of laughter and applause among the employees. When it subsided, Wallace continued, "You know, 300 million dollars. I mean it's through the roof. Is that even being considered or anything?"

Beake responded that the $300 million was sales revenue and not profits, and that the Company's profit margin was only pennies on the dollar. He acknowledged that the healthcare plan had some drawbacks as well as benefits, but said the Company tried to do the best it could for the employees by changing to the high deductible plan and covering half of the deductible for them.

Wallace then followed up with a second question: "Is there any way you could contribute the full 3,000 or the full contribution? Because some companies do that. I was just wondering." Beake replied that "most companies don't contribute *anything* to the deductible." The Company does, he continued, and "obviously it pleases a lot," but "[i]t doesn't please all." He noted that the Company spent over $23 million on healthcare in 2014, and said it would continue to look at the plan to try to manage its costs.

Another employee then asked a question about the next open enrollment for the long-term and wellness programs. Wallace, however, did not remain to hear the answer. He was near the back of the room, next to the rear door (one of three exits), and decided to leave at that point and return to his work station. When he got there, he saw his supervisor, Myers, who had left even earlier, about halfway through the meeting. Wallace told Myers he left because the packed room was so hot and stuffy, and Myers said he had left for the same reason. Wallace also told Myers

about the applause in response to his question to Beake, and said he hoped he would not get in trouble for it. Myers assured him he would not.

Back at the meeting, Beake continued to take questions for a few more minutes. After the last one was answered, he announced, "We're out of time," and thanked everyone. The employees then returned to their work stations.[66]

Wallace continued working the remainder of the day and again on April 1, 3, and 5 without any problem. On April 6, however, after he had finished lunch, the shift manager told him to "grab [his] stuff" and escorted him to HR. When he arrived, Warehouse Manager Vaivao and Allen, the new HR representative, were there.[67] Wallace asked Vaivao what was going on. Vaivao replied,

> We have a situation here. Senior staff was offended that you asked about the healthcare . . . [S]enior staff thought you were rude and disrespectful and you're being terminated.

Wallace asked how he could be fired for asking questions when the employees had been invited to do so. Vaivao replied,

> Senior staff came together and . . . [the] decision came from Norm and Kent [McClelland] . . . that you're not going to be happy with the benefits that we give you so you can find a company with better benefits.[68]

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[66] The foregoing summary is based primarily on the recording and transcript of the meeting (GC Exh. 11(a), (b)), and the credible testimony of Wallace (Tr. 657–659) and Phipps (Tr. 536–537). Wallace testified that he also saw two other employees leave early. However, this testimony was not corroborated and the General Counsel's posthearing brief does not mention or rely on it. As for Myers, he admitted that he left early (Tr. 864–865). Although he testified that he did so because "about that time of year . . . I just get a cold and I started coughing really bad," he did not deny telling Wallace that he had left early for the same reason he did.

[67] Allen subsequently resigned in June 2015 (Tr. 370–371), and did not testify.

[68] I credit Wallace's testimony about the meeting with Vaivao and Allen (Tr. 659–662, 665–666, 678, 696–697), which was detailed and consistent both with what he subsequently told Phipps (Tr. 541–543, 609) and with the sworn statement he gave to the NLRB 2 weeks after the meeting (R. Exh. 5, pp. 9–10). Although Kent McClelland denied any involvement in the discharge decision (Tr. 351–352), and Vaivao denied saying or suggesting otherwise on April 6 (Tr. 150–154, 906), I discredit that testimony. First, there is no reason to believe Beake would not have spoken to one or both of the McClellands about the meeting. As indicated above, Beake reported directly to them on a regular basis, and there was plenty of time to report to them about the state-of-the-company meeting between March 31 and April 6. Indeed, Beake did not deny reporting to the McClellands about the meeting, and the Company has offered no other explanation for the week-long delay before discharging Wallace. Moreover, as discussed infra, HR Vice President Daniels' testimony that he alone made the discharge decision without talking to anyone is wholly unbelievable. Second, as noted above (fns. 12, 13, 16, 20, 49), Vaivao was a particularly unreliable witness. And his testimony about the March 31 meeting that led to Wallace's termination was no better. For example, he testified that Wallace was the only one who left the meeting early (Tr. 193). However, as indicated above, there is no dispute that

Allen then presented Wallace with a "Separation Agreement and Release and Waiver." The agreement stated that he was being terminated effective that day, and set forth the total amount of "separation benefits" he would receive, in addition to any unpaid wages, "*provided*" he signed the agreement. It also contained various other terms and conditions, including, as discussed below, several confidentiality provisions. (GC Exh. 26.) Wallace signed that he received the agreement, but refused to sign that he accepted it.

The parties agree that the proper test for evaluating whether Wallace's discharge was unlawful is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under that test, the General Counsel must prove by a preponderance of the evidence that the employee's union or other protected activity was a substantial or motivating factor in the adverse action. The General Counsel can make a sufficient initial showing in this regard by demonstrating that (1) the employee engaged in the union or protected activity and the employer knew it, or the employer believed or suspected that the employee engaged in or was likely to engage in such activity, and (2) the employer had animus against such activity. If the General Counsel makes the required initial showing, the burden shifts to the employer to establish by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's actual or suspected union or protected activity. See *Corliss Resources*, 362 NLRB No. 21, slip op. at 13 (2015); *Consolidated Bus Transit,* 350 NLRB 1064, 1065 (2007); *Signature Flight Support*, 333 NLRB 1250 (2001), affd. 31 Fed. Appx. 931 (11th Cir. 2002); and *Multi-Ad Services*, 331 NLRB 1226, 1240 (2000), enfd. 255 F.3d 363 (7th Cir. 2001), and cases cited there.

Here, as indicated above, the General Counsel alleges that the Company unlawfully discharged Wallace (1) for complaining about the healthcare plan, and/or (2) because it knew or suspected that he supported the union campaign. With respect to the first, the General Counsel has clearly satisfied the initial *Wright Line* burden. It is well established that an employee engages in protected concerted activity by complaining at a group meeting about employment terms common to all employees. *Worldmark by Wyndam*, 356 NLRB 765 (2011). And the applause from Wallace's coworkers in response to his initial question to Beake certainly supports applying that general principle here. Further, Vaivao specifically stated at the termination meeting that Wallace was being fired for complaining to Beake about the Company's healthcare plan at the meeting.[69]

Myers, Wallace's direct supervisor, left the meeting about halfway through. Vaivao also testified that Wallace was "agitated" when he asked his questions, and that he "got up and stormed out" after Beake answered them (Ibid.). However, neither is reflected in the recording of the meeting: Wallace asked his questions in a normal/conversational tone, and there is no sound of any disturbance after Beake answered them. Further, as indicated above, Wallace was right next to the rear exit, and Beake himself testified that he did not even notice Wallace leaving (Tr. 444, 446). Finally, although Daniels testified that Wallace made a dismissive wave forward with his hand as he walked out of the meeting (Tr. 714), there was no mention of this in the Company's position statement during the NLRB's investigation (GC Exh. 29, p. 22, par. 5), no other witness testified at the hearing that they saw Wallace make such a gesture (not even Vaivao), and Wallace himself credibly denied doing so (Tr. 657).

[69] As noted above, I have credited Wallace's testimony about what Vaivao said at the termination meeting. Although Phipps acknowledged that he had not been disciplined when he

The General Counsel has also satisfied the initial *Wright Line* burden with respect to the second. As indicated above, Wallace was a union supporter. And it is certainly a reasonable inference that the Company knew or suspected this given the nature of Wallace's questions at the January 28 and March 31 meetings and Vaivao's statements at the March 26 union prevention meeting that the Company knew "exactly" which "disgruntled" employees supported the Union and attended union meetings.[70] Further, the Company's strong animus toward union supporters is well established by the Company's numerous unfair labor practices and the record as a whole. See *Metro-West Ambulance Service,* 360 NLRB No. 124, slip op. at 1 (2014); and *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 6 (2014), and cases cited there (employer's contemporaneous 8(a)(1) violations demonstrate its union animus).[71]

Moreover, as discussed below, there is an abundance of other, circumstantial evidence that the discharge was unlawfully motivated. See, e.g., *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935–939 (D.C. Cir. 2011); and *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966) (unlawful motive for discharge may be established by circumstantial evidence).

Shifting reasons for discharge. In the June 8 position statement it filed during the NLRB investigation of the allegations, the Company stated that Wallace was discharged for "belligerently interrupting a senior Company official multiple times" and because he "abruptly left the meeting without permission" (GC Exh. 29, p. 22, par. 5). At the hearing, however, HR Vice President Daniels, who claimed that he alone made the decision, testified that Wallace was terminated because he made a "dismissive waving gesture forward" with his hand after Beake answered his questions and because he walked out of the meeting (714–715). And Daniels later testified that Wallace was terminated solely for leaving the meeting (Tr. 718). See also the Company's posthearing brief at 43 ("Wallace was discharged because he stormed out of [the] March 31 mandatory meeting").[72]

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complained in an arguably rude and disrespectful manner at previous company meetings about how the Company treated employees, those meetings were conducted before the union campaign and/or by lower level managers or supervisors. See Tr. 543–544, 601, 609–611, 630–631; and R. Exh. 1, p. 36.

[70] See sec. A.6, above. Engdahl admitted that Wallace's question about Shamrock's unionized competitors at the January 28 town hall meeting "stuck" with him, as it was "pretty insightful" and had never been asked at any of the numerous similar meetings he had conducted in the past (Tr. 894, 897–898).

[71] See also *EF International Language School, Inc.,* 363 NLRB No. 20, slip op. at 1 n. 2 (2015) (General Counsel is not required to show animus toward the alleged discriminatee's union or protected activity in particular in order to satisfy the initial burden under *Wright Line*).

[72] The Company did not produce a termination report or any other documents regarding the discharge, as requested in paragraphs 28–33 of the General Counsel's subpoena duces tecum (Tr. 542). When asked for an explanation on the second day of hearing for failing to produce a termination report, company counsel stated, "Your Honor, we did look into that. There is no—currently, they don't give written termination of assistant people. We did—that one we did look into, and it just doesn't exist." Counsel also stated that there were no emails or other communications about the discharge because Daniels had "compartmentalized" the decision. (Tr. 84–85.) However, subsequent testimony established that the Company does regularly prepare termination reports; that there was a termination report for Wallace; and that it was circulated by

Such shifting reasons support an inference of unlawful motive. See, e.g., *Lucky Cab*, above; *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999); *Black Entertainment Television*, 324 NLRB 1161 (1997); and *Zurn Industries,* 255 NLRB 632, 635 (1981), affd. 680 F.2d 683, 694 (9th Cir. 1982), cert. denied 462 U.S. 1131 (1983).

False reasons for discharge. As indicated above, Wallace did not interrupt Beake, belligerently or otherwise, not even once. Nor did he make any dismissive gestures when he left the meeting. See fn. 68, supra. Even the one consistent reason offered to the NLRB during the investigation and hearing—that Wallace engaged in insubordination by leaving the mandatory meeting early—is at best a distortion or exaggeration of the facts. As discussed above, Beake twice stated to the employees that the meeting would "end" or "close" with the recorded message from Norman McClelland. And he repeated this yet again when the recording had finished, stating that it "close[d] out what [the Company] wanted to convey" to the employees. Thus, while Beake thereafter offered to answer any questions, the offer was clearly a mere courtesy.

Such false or exaggerated reasons are likewise evidence of unlawful motive. See, e.g., *Lucky Cab*, above; *Key Food*, 336 NLRB 111, 114 (2001); *Yenkin-Majestic Paint Co.*, 321 NLRB 387, 396 (1996), enfd. mem. 124 F.3d 202 (6th Cir. 1997); *Radisson Muehleback Hotel*, 273 NLRB 1464, 1475–1476 (1985); *William L. Meyers, Inc.*, 266 NLRB 342, 346 (1983), enfd. mem. 735 F.2d 1371 (9th Cir. 1984); and *Ramada Inn*, 201 NLRB 431, 434-435 (1973). See also *Shattuck Denn Mining Corp*., above.

Lack of consultation or investigation. As previously noted, Daniels testified that he decided to fire Wallace on his own, without consulting *anyone*—not his immediate superior Beake (who he meets with daily and is the person Wallace allegedly disrespected), Vaivao (who manages the Phoenix warehouse), or Myers (who supervised Wallace). Nor did he speak to Wallace himself. (Tr. 711–712, 720–721).

However, there are two problems with this testimony. First, it is inherently unbelievable. As indicated above, Daniels had been hired as HR vice president only 6 months earlier. Further, he admitted on cross-examination that he focuses on "strategic matters" and is "not in the bowels of the ship"; that he had "never" been involved in terminating a warehouse employee before; and that he was unfamiliar with the Company's policies, personnel handbook, or progressive disciplinary system.[73] Moreover, it is inconsistent with other evidence. As indicated above, Vaivao told Wallace that the McClellands had made the decision. Further, Daniels testified that

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email (Tr. 403–410). For this and the other reasons previously discussed, I ruled during the hearing that the General Counsel was entitled to various evidentiary sanctions, including, on request, appropriate adverse inferences. See fn. 29, above. However, the General Counsel's posthearing brief does not request an adverse inference that the discharge was unlawfully motivated based on the Company's subpoena noncompliance. And given all of the other direct and circumstantial evidence of unlawful motive discussed above, it is unnecessary to adopt or rely on an adverse inference.

[73] Tr. 716–718. The handbook states: "Discipline will be administered utilizing the following guidelines, but discipline may start at any level within this process: Step 1–Counseling; Step 2–Verbal Warning; Step 3–Written Warning; Step 4–Final Warning/3-Day Suspension; Step 5–Termination" (GC Exh. 3, p. 64). Daniels admitted that he did not consult the handbook or the disciplinary guidelines in deciding to immediately terminate Wallace (Tr. 717–718).

he told Allen to fire Wallace the very next day after the March 31 meeting, i.e. on April 1 (Tr. 720). However, Allen and Vaivao did not do so until April 6, allowing Wallace to continue working on April 1, 3, and 5. And, as noted above, no explanation has been offered for the delay.[74]

Second, even if Daniels did, in fact, make the decision in the confined and constricted manner he described, this in itself is strong evidence of unlawful motive. As indicated above, while Daniels may have had the authority to terminate warehouse employees, he did not have any experience, knowledge, or responsibility regarding such disciplinary decisions at Shamrock. Further, it takes little imagination to think of one or two common reasons why Wallace might have had an urgent need to leave the meeting. Thus, if Daniels was truly concerned about Wallace leaving the meeting during the open question period, it would have been natural (and consistent with the Company's desire to treat employees "like family") to inquire why Wallace had left before terminating him. Yet, Daniels never did so. Accordingly, it is a reasonable inference that this was not the real reason for discharging him, but a pretext to conceal the Company's unlawful motive. See, e.g., *Golden State Foods Corp*., 340 NLRB 382, 385 (2003) (respondent did not seek an explanation from employee before suspending him); *Casa San Miguel, Inc*., 320 NLRB 534, 571 (1995) (respondent failed to consult with employees' supervisor or even speak to the employees involved before disciplining them); and *Williams Services,* 302 NLRB 492, 502 (1991) (respondent failed to consult with the site manager or any of the employee's immediate supervisors before terminating her).[75]

Finally, the Company has failed to satisfy its burden of showing that it would have taken the same action anyway, regardless of Wallace's protected conduct. Indeed, given that the Company's proffered reason or reasons for discharging Wallace were pretextual, the Company has failed by definition to make such a showing. See, e.g., *Stevens Creek Chrysler Jeep Dodge,* 357 NLRB 633, 639 (2011), enfd. sub. nom. *Mathew Enterprise v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012); and *Golden State Foods*, above. Accordingly, the discharge of Wallace violated Section 8(a)(1) and (3) of the Act, as alleged.[76]

b. The separation agreement

The General Counsel contends that the following three provisions of the separation agreement were overbroad and unlawful under the first prong of the test in *Lutheran Heritage*,

[74] I therefore discredit Daniels' testimony. Rather, I find, consistent with Vaivao's statements at the April 6 termination meeting (which as previously noted constitute nonhearsay admissions), that Beake and/or other managers met with or otherwise reported to the McClellands between March 31 and April 6 what transpired at the meeting, and that the McClellands directed that Wallace be discharged.

[75] As discussed above, Myers, Wallace's supervisor, also left the meeting early, and there is no evidence that he was disciplined, much less discharged, for doing so. However, the General Counsel's posthearing brief does not rely on this disparate treatment as evidence of the Company's unlawful motive.

[76] In light of the foregoing findings, it is unnecessary to address the General Counsel's alternative argument (Br. 55–56) that the discharge was unlawful under the standards set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) for evaluating when an employee's outburst during protected activity costs the employee the protection of the Act.

supra, i.e. because employees would reasonably construe them to prohibit union or protected activity:[77]

> 10. You agree that, except as may be required by law, you will not directly or indirectly, use or disclose, or allow the use or disclosure, to any person, business, firm, corporation, partnership or other entity any confidential, or proprietary information concerning any of the Released Parties, its business, its suppliers or its customers. All information, whether written or otherwise, regarding the Released Parties' businesses, including but not limited to financial, personnel or corporate information and information regarding customers, customer lists, costs, prices, earnings, systems, operating procedures, prospective and executed contracts and other business arrangements and sources of supply are presumed to be confidential information of the Released Parties for purposes of this Agreement . . . .
>
> * * *
>
> 12. You have executed a Confidentiality Agreement and you acknowledge that the terms of such agreement remain in effect notwithstanding the termination of your employment. . . . You may not use/disclose any of the Company's Confidential Information for any reason following your termination and during the transition period.
>
> 13. You agree not to make any disparaging remarks or take any action now, or at any time in the future, which could be detrimental to the Released Parties. . . . [GC Exh. 26, p. 3–4.]

The General Counsel's position is well supported. The prohibitions in paragraphs 10 and 12 on disclosing "confidential information," including any "personnel or corporate information," following termination of employment would reasonably be interpreted as prohibiting the discussion of the Company's wages, hours, and working conditions with a union or other third person or entity. See *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 1 n. 1, and JD. at 7 (2015) (employer's confidentiality agreement provided that "information about physicians, other employees, and the internal affairs of [the company] are considered confidential"); and *DirectTV U.S.*, 359 NLRB No. 54, slip op. at 3 (2013), reaffd. 362 NLRB No. 48, slip op. at 1 n. 1 (2015) ("confidentiality" provision in employer's handbook instructed employees to "[n]ever discuss details about your job, company business or work projects with anyone outside the company" and to "[n]ever give out information about . . . employees," and expressly included "employee records" as one category of "company information" that must be held confidential). See also *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014).

Paragraph 13's broad prohibition, without any accompanying explanation or illustrative examples, on making "any disparaging remarks or tak[ing] any action now, or at any time in the future, which could be detrimental" to the Company would likewise reasonably be interpreted to prohibit or restrict union or protected activity. See *Lily Transportation Corp.*, 362 NLRB No. 54

[77] See discussion in sec. A.7 above.

(2015), slip op. at 1 and JD at 8 (employer's handbook rule stated that company would "use every means available under the law to hold persons accountable for disparaging, negative, false, or misleading information or comments involving [the company or its] employees and associates on the internet and may take corrective action up to and including discharge of offending employees"); *First Transit,* 360 NLRB No. 72, slip op. at 1 n. 5 (employer's "disloyalty" rule prohibited employees from participating "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," or "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company"); and *Hills & Dales General Hospital*, 360 NLRB No. 70 (2014) (employer's rules prohibited employees from "engaging in . . . negativity" or "mak[ing] negative comments about our fellow team members, including coworkers and managers," and required employees to "represent [the company] in the community in a positive and professional manner").

Contrary to the Company's contention, it makes no difference that the foregoing provisions were contained in a separation agreement and that Wallace refused to sign it. Cf. *Metro Networks*, 336 NLRB 63, 67 n. 20 (2001) (finding that the employer violated Section 8(a)(4) and (1) of the Act by offering unlawfully discharged employees severance agreements that included overbroad nonassistance and nondisclosure provisions, notwithstanding that employees refused to sign it).

The General Counsel also challenges paragraph 9 of the separation agreement, which states:

> 9. Because the information in this Separation Agreement is confidential, it is agreed that you will not disclose the terms of this Separation Agreement to anyone, except that you may disclose the terms of this Separation Agreement to your family, your attorney, your accountant, a state unemployment office, and to the extent required by a valid court order or by law.

The General Counsel argues that this provision is likewise unlawful under *Lutheran Heritage* because it "essentially prohibit[s] [Wallace] from discussing his discharge, a clear violation of the Act" (Br. 57).

However, the provision cannot reasonably be construed in this manner. The separation agreement and its terms say nothing about the underlying circumstances or reasons for the discharge. Therefore, nothing in paragraph 9 prohibits disclosing those circumstances or reasons. Accordingly, as the General Counsel has cited no other basis or authority for invalidating the provision, the allegation is dismissed.

2. Mario Lerma

As discussed in section B. 7 above, on May 5 Operations VP Engdahl and Warehouse Manager Vaivao met with Lerma to discuss "rumblings coming off the floor" about him "heckling," "insulting," and engaging in "potential slowdown[s]" against coworkers who did not support the union campaign. During the course of that meeting, Engdahl and Vaivao made unlawful statements that created an overbroad rule that employees would reasonably construe as prohibiting or restricting protected union activity, and threatened Lerma with reprisals if he

violated that rule. The General Counsel alleges that Engdahl and Vaivao also unlawfully disciplined Lerma at the May 5 meeting because of his protected union activities, and to discourage him and other employees from engaging in such activities (GC Exh. 1(m), par. 6(a), (c)).[78]

The record supports the allegation. First, although the Company denies it, a preponderance of the evidence establishes that Lerma was, in fact, disciplined at the meeting. Indeed, Vaivao acknowledged at the hearing that the meeting was in the nature of a "counseling" (Tr. 245), which as noted above (fn. 73) is the first step in the Company's progressive disciplinary process. This is consistent with Vaivao's statement at the meeting that Lerma could get in "deeper trouble" if employees continued to complain about him, a statement which both confirmed that Lerma was already in trouble, and warned that he would be in even more trouble in the future. Further, although Engdahl subsequently assured Lerma that he was "not getting in trouble" at that time, he immediately cast a shadow over that assurance with a veiled warning that Lerma would be terminated, the very last step in the progressive disciplinary process, the next time. Cf. *Altercare of Wadsworth*, 355 NLRB 565 (2010) (finding that the employer's verbal warnings to several employees constituted discipline, even though they were not memorialized in the employees' personnel file, as such warnings were specifically included in the employer's progressive disciplinary system and the warnings were administered to the employees by high level officials).

Second, the evidence also establishes that the discipline was unlawful. Again, the parties agree that the proper analysis is set forth in *Wright Line.*[79] Applying that analysis, the General Counsel clearly satisfied the initial burden. As discussed in section B.6 above, Lerma was a prominent union supporter, the Company obviously knew it, and the Company's animus is amply demonstrated by its numerous other violations, including Supervisor Garcia's unlawful search for union cards on Lerma's clipboard just a few days before the May 5 meeting. Moreover, as previously discussed, Engdahl and Vaivao admitted that they did not even investigate the alleged complaints about Lerma's "heckling," "insulting," and "potential slowdown[s]." As discussed above with respect to Wallace's discharge, this admission is strong circumstantial evidence that Lerma's alleged misconduct was not the real reason for disciplining him, but a pretext to conceal the Company's true motive: to discourage Lerma from continuing to solicit support for the union. It also effectively prevents the Company from satisfying its rebuttal burden of establishing that it would have disciplined Lerma anyway, even if he had not engaged in the alleged misconduct. Accordingly, the discipline violated Section 8(a)(3) of the Act as alleged.

[78] The complaint and amended complaint allege that, like Wallace, Lerma was also disciplined because he engaged in other protected concerted activities, in violation of Section 8(a)(1) of the Act. However, the General Counsel's posthearing brief argues only that Lerma was disciplined because of his union activities, in violation of Section 8(a)(3). Accordingly, the independent 8(a)(1) discipline allegation appears to have been abandoned. In any event, the General Counsel failed to carry the burden of proof and persuasion.

[79] No party asserts that the discipline should be evaluated under the *Burnup & Sims* analysis applicable where an employer disciplines an employee for misconduct during the course of protected activity. See *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964).

D. Alleged Unlawful Employee Handbook Rules

The General Counsel alleges that the Company has maintained numerous rules in its Associate Handbook during the same period that are unlawfully overbroad under the first prong of the *Lutheran Heritage* test, i.e. because employees would reasonably construe them to prohibit or restrict protected activity (GC Exh. 1(g), pars. 5(b)–(e); Tr. 750–752). [80]

1. Company confidential information

The handbook contains numerous sections, including one entitled "Protecting the Company's Confidential Information." It states in relevant part as follows:

> The Company's confidential information is a valuable asset and includes: information, knowledge, or data concerning costs, commission reports or payments, purchasing, profits, markets, sales, discounts, margins, customer histories or preferences, relationships with vendors, organization structures, associates, customers, surveys, customer lists, lists of prospective customers, customer account records, marketing plans or efforts, sales records, training and service materials, Company manuals and policies, computer programs, software and disks, order guides, financial statements and projections, business plans, budgets, supplier lists, contracts, calendars and/or day-timers that contain customer contact and other customer information, compensation schedules, proposals and quotes for business, notes regarding customers and prospective customers and pricing information.
>
> This information is the property of the Company and may be protected by patent, trademark, copyright and trade secret laws. All confidential information must be used for Company business purposes only. Every associate, agent, and contractor must safeguard it. THIS RESPONSIBILITY INCLUDES NOT DISCLOSING THE COMPANY CONFIDENTIAL INFORMATION, INCLUDING INFORMATION REGARDING THE COMPANY'S PRODUCTS OR BUSINESS, OVER THE INTERNET, INCLUDING THROUGH SOCIAL MEDIA. . . .
>
> (i) Non-Disclosure/Assignment Agreement. When you joined the Company, you signed an agreement to protect and hold confidential the Company's proprietary information. This agreement remains in effect for as long as you work for the Company and after you leave the Company. Under this agreement you may not disclose the Company's confidential information to anyone or use it to benefit anyone other than the Company without the prior written consent of an authorized Company officer. . . . [GC Ex. 3, pp. 8–9.]

[80] See discussion in sec. A.7 above. Although the complaint alleges that the rules are also discriminatory, the General Counsel's posthearing brief argues only that they are overbroad, and thus appears to abandon that allegation. In any event, the General Counsel has failed to carry the burden of proof and persuasion.

Like the confidentiality provisions in the Company's separation agreement, the broad provisions of the foregoing rule, which designate as confidential any "information, knowledge, or data" concerning "associates" (i.e. employees), "Company manuals and policies," and "compensation schedules," would reasonably be interpreted to prohibit employees from discussing wages, hours, and working conditions with a union or other third person or entity. Accordingly, the provisions violate Section 8(a)(1) of the Act as alleged. See cases cited in sec. C.1.b above.

2. Government information requests

The handbook also includes a section entitled "Handling the Confidential Information of Others." It contains seven subsections, including one entitled "Requests by Regulatory Authorities," which states:

> The Company and its associates must cooperate with appropriate government inquiries and investigations. In this context, however, it is important to protect the legal rights of the Company with respect to its confidential information. All government requests for information, documents or investigative interviews must be referred to the Company's Human Resources Department. No financial information may be disclosed without the prior approval of the Company's President or Chief Financial Officer. [GC Exh. 3, p. 11]

The General Counsel argues that this provision would reasonably be interpreted to require employees to refer NLRB requests for documents or investigative interviews to the Company, thereby interfering with the investigation of unfair labor practice charges.

Reading the provision in isolation, the General Counsel's argument is well supported by Board precedent. See *DirectTV*, above, 359 NLRB No. 54, slip op. at 3 (employer's handbook stated that, "[i]f law enforcement wants to interview or obtain information regarding a [company] employee . . . the employee should contact the security department . . . who will handle contact with law enforcement agencies and any needed coordination with [company] departments"). See also *Management Consulting, Inc*., 349 NLRB 249 (2007), and cases cited there (employer statements that discourage employees from providing information and hinder the Board's investigation of unfair labor practice charges violate Section 8(a)(1) of the Act).

However, in evaluating whether a challenged rule is unlawful, the Board does not read particular phrases in isolation. *Lutheran Heritage*, 343 NLRB at 646. Here, as indicated above, the subject provision is actually a subsection of a broader section. The introductory paragraph of that section indicates that it deals only with confidential information provided to the Company by "third party" companies and individuals that the Company has, or may eventually have, "business relationships" with. Thus, the Company argues that, read in context, the subject provision would not reasonably be interpreted to encompass government requests for information about its own employees or their wages, hours, and working conditions.

The Company's argument is a reasonable one. Further, the General Counsel, who has the burden of proof and persuasion, offers no rebuttal to it, instead simply ignoring the context of the provision. See GC's Br. at 68. Accordingly, this allegation is dismissed. See generally

Professional Medical Transport, Inc., 362 NLRB No. 19, slip op. at 13 (2015); and *Desert Toyota*, 346 NLRB 110, 115 (2005).

3. Media information requests

Another subsection under the same section is entitled "Company Spokespeople." It states:

> The Company has an established Spokesperson who handles all requests for information from the Media. Ms. Sandra Kelly at the Dairy is the person who has been designated to provide overall Company information or to respond to any public events or issues for which we might receive press calls or inquiries. If you believe that an event or situation may result in the press seeking additional information, please contact Ms. Kelly at the Dairy to advise her of the nature of the situation so that she may be prepared for any calls. Only the Company's CEO may authorize another associate to speak on behalf of the Company. [GC Exh. 3, p. 11].

The General Counsel argues that this provision would reasonably be interpreted to require employees to disclose to the Company whenever they have plans to publicize matters related to their terms and conditions of employment or a union organizing campaign, thereby unlawfully interfering with their right to freely do so and discouraging them from engaging in such protected activity. Again, however, the General Counsel fails to acknowledge or address the fact that the provision is set forth in a section that is limited to confidential information provided to the Company by "third party" companies and individuals that the Company has, or may eventually have, "business relationships" with. Accordingly, this allegation is dismissed as well.

4. Company electronic and telephonic communications systems

The handbook also includes a section entitled "Electronic and Telephonic Communications." The introductory paragraphs of the section state in relevant part:

> All electronic and telephonic communications systems and all communications and information transmitted by, received from, or stored in these systems are the property of Shamrock and as such are to be used solely for job-related purposes. The use of any software and business equipment, including, but not limited to, facsimiles, computers, the Company's E-mail system, the Internet, and copy machines for private purposes is strictly prohibited. . . .
>
> Moreover, improper use of the E-mail system (e.g., spreading offensive jokes or remarks), including the Internet, will not be tolerated. [GC Exh. 3, p. 59]

The General Counsel contends that the first paragraph is unlawful because it prohibits employees from using the Company's email and other electronic and telephone systems for union or other protected activities even during nonworking time, citing *Purple Communications, Inc.*, 361 NLRB No. 126 (2014) (holding that employers must allow employees to use their company email accounts for protected communications during nonworking time absent special circumstances making a ban necessary to maintain production or discipline). The General

Counsel contends that the second provision is unlawfully overbroad because employees would reasonably construe the ban on "improper" use of such systems to include protected conduct.

However, the Board in *Purple Communications* made clear that such usage restrictions are only unlawful if employees actually have access to the employer's systems. See slip op. at 1, 3, and 5. See also *UPMC*, 362 NLRB No. 191, slip op. at 3 (2015). As indicated by the Company, the record here fails to establish that the warehouse employees have such access. Former HR Manager Wright specifically testified that they do not have access to the email system (Tr. 375), and no evidence was presented to rebut her testimony or to establish that the employees have access to other electronic and telephone systems.[81] Accordingly, this allegation is also dismissed.

5. Monitoring use

The same section includes a subsection entitled "Monitoring Use." It states in relevant part:

> To ensure that the use of electronic and telephonic communications systems and business equipment is consistent with Shamrock legitimate business interests, authorized representatives of Shamrock may monitor the use of such equipment from time to time. This includes monitoring internet usage of any kind. This may also include listening to stored voicemail messages. In some functions, telephone monitoring is used to assist in associate training and the development of quality customer service: The associate will be notified if telephone monitoring is applicable to their area.
>
> In addition, Shamrock reserves the right to use software and blog-search tools to monitor comments or discussions about company representatives, customers, vendors, other associates, the company and its business and products, or competitors that associates or non-associates post anywhere on the Internet, including in blogs and other types of openly accessible personal journals, diaries, and personal and business discussion forums.
>
> *Shamrock cautions that associates should have no expectation of privacy while using company equipment and facilities for any purpose.* [GC Exh. 3, p. 59.]

The General Counsel contends that the second paragraph above is unlawful because it creates the impression that the Company will engage in surveillance of employees' protected activities on the internet. The General Counsel acknowledges that the Board in *Purple Communications* stated that an employer could monitor its computers and email systems for legitimate management reasons, and could also notify its employees that it would do so. However, the General Counsel argues that the second paragraph is nevertheless unlawful because it is not limited to monitoring the Company's computers and email system, but includes comments or discussions employees post using their personal computers or email accounts.

[81] Arguably, the fact that the email provision is contained in the employee handbook is itself circumstantial evidence that employees have email access. However, the General Counsel's posthearing brief does not make this argument. Indeed, it does not even address the access issue.

However, as indicated above, the introductory paragraphs of the section indicate that the subsection only applies to company computer and email systems. This is also apparent from the first and third paragraphs of the subsection itself. Again, the General Counsel's posthearing brief fails to acknowledge or address this factual context.[82] Accordingly, this allegation is dismissed as well.

6. Instant messaging

The same section also includes a subsection entitled "E-mail," which states:

> Associates are prohibited from using any Instant Messaging applications except those provided specially by Shamrock for Associate's business use. External E-mail messages may carry one or more attachments. An attachment may be any kind of computer file, such as a word processing document, spreadsheet, software program, or graphic image. [GC Exh. 3, p. 60.]

The General Counsel contends that this provision is unlawful for the same reasons the previous two provisions above are unlawful, i.e. because it prohibits employees from using company computer systems to send instant messages about union or other protected activity even during nonworking time, and because it is not limited to company computer systems, and thus employees would reasonably conclude that the rule also prohibits them from doing so on their personal computer systems or devices.

Both arguments again fail for the same reasons discussed above. There is no evidence that the employees have access to company computer systems to send instant messages, and the introductory paragraphs of the section in which the subsection appears indicate that the subsection only applies to instant messaging on company computer systems. Accordingly, this allegation is likewise dismissed.

7. World Wide Web

The same section also includes a subsection entitled "World Wide Web," which states in relevant part:

> As a general rule, associates may not forward, distribute, or incorporate into another work, material retrieved from a Web site or other external system. Very limited or "fair use" may be permitted in certain circumstances. Any associate desiring to reproduce or store the contents of a screen or Web site should contact their Supervisor to ascertain whether the intended use is permissible.
>
> Use of the World Wide Web includes all restrictions, which apply generally to the use of the Company's E-mail and other electronic and telephonic equipment, as noted above. In addition, the following rules apply with respect to Internet usage:

[82] Like the complaint, the General Counsel's posthearing brief sets forth only the second paragraph of the subsection. It omits the first and third paragraphs without any signal, notation, or explanation.

> * * *
>
> 2. No Downloading of Non-Business Related Data: The Company allows the download of files from the Internet. However, downloading files should be limited to those that relate directly to Shamrock business.
>
> * * *
>
> 4. No Participation in Web-Based Surveys without Authorization: When using the Internet, the user implicitly involves Shamrock in his/her expression. Therefore, users should not participate in Web or E-mail based surveys or interviews without authorization. [GC Exh. 3, p. 60.]

The General Counsel contends that this provision is unlawful for similar reasons, i.e. because (1) it would reasonably be read by employees to (a) prohibit them downloading, forwarding or distributing to coworkers information from the internet or other external source about a union, the Company, or the employees and their terms and conditions of employment; and (b) require them to obtain the Company's authorization to participate in surveys from unions about their concerns or interest in union representation; (2) "there is no language in the provision indicating that it was intended to apply only to use of the [Company's] computer system and equipment"; and (3) even if the provision is limited to the Company's computer systems and equipment, the Company has failed to show special circumstances for the restrictions as required by the Board's decision in *Purple Communications*, above (GC Br. 74–75).

All of these arguments again fail for the same reasons discussed above. Both the context and the content of the provision indicate that it applies only to company computers and equipment,[83] and there is no evidence the employees have access to them. Accordingly, this allegation is also dismissed.

8. Blogging

The same section also includes a subsection entitled "Blogging," which states:

> The following rules and guidelines apply to blogging, whether blogging is done for Shamrock on company time, on a personal Web site during non-work time, or outside the workplace. The rules and guidelines apply to all associates.
>
> [1.] Shamrock discourages associates from discussing publicly any work-related matters, whether confidential or not, outside company-authorized communications. Nonofficial company communications include Internet chat rooms, associates' personal blogs and similar forms of online journals or diaries, personal newsletters on the Internet, and blogs on Web sites not affiliated with, sponsored, or maintained by Shamrock.

[83] Again, the General Counsel's posthearing brief omits and entirely ignores the first sentence of the second paragraph of the provision referencing "the Company's E-mail and other electronic and telephonic equipment."

[2.] Associates have a duty to protect associates' home addresses, social security numbers, birth date, driver's license number, and other personal information and the confidentiality of Shamrock trade secrets, marketing lists, customer account information, strategic business plans, competitor intelligence, financial information, business contracts, and other proprietary and nonpublic company information that associates can access.

[3.] Associates cannot use blogs to harass, threaten, libel, or slander, malign, defame or disparage, or discriminate against co-workers, managers, customers, clients, vendors or suppliers, and organizations associated or doing business with Shamrock, or any members of the public, including Web site visitors who post comments about blog contents.

[4.] Associates who maintain blogs on their own or another Web site and choose to identify themselves as associates of Shamrock are strongly encouraged to state explicitly, clearly, and in a prominent place on the site that views expressed in their blogs are associates' own and not those of Shamrock or of any person or organization affiliated or doing business with Shamrock.

[5.] Shamrock respects associates' right to express personal opinions in personal blogs and does not retaliate or discriminate against associates who use their blogs for political, organizing, or other lawful purposes.

[6.] Associates cannot use Shamrock's logo or trademarks or the name, logo, or trademarks of any business partner, supplier, vendor, affiliate, or subsidiary on any personal blogs or other online sites unless their use is sponsored or otherwise sanctioned, approved, or maintained by Shamrock.

[7.] Associates cannot post on personal blogs Shamrock's copyrighted information or company-issued documents bearing Shamrock's name, trademark, or logo.

[8.] Associates cannot post on personal blogs photographs of company events, other associates or company representatives engaged in Shamrock's business, or company products, unless associates have received Shamrock's explicit permission.

[9.] Associates cannot advertise or sell company products or services via personal blogs.

[10 .] Shamrock discourages associates from linking to Shamrock's external or internal Web site from personal blogs.

[11.] Shamrock will not construe this policy nor apply it in a manner that interferes with associates' rights under Section 7 of the NLRA. [GC Exh. 3, pp. 61–62.]

The General Counsel contends that the foregoing provision is unlawful because (1) it explicitly states that it applies outside the workplace; and (2) paragraphs 1–3, 6–8, and 10 would reasonably be read by employees to prohibit or limit their right to engage in protected union or other concerted activities (GC Br. 78–80).

As indicated by the General Counsel, unlike the other subsections discussed above, this subsection clearly indicates that it is *not* limited to company computers and equipment. Thus, the subject paragraphs must be evaluated to determine whether they would reasonably be construed to prohibit or restrict employees from using their personal computers or other devices to engage in union or other protected communications or discussions on the internet.

Paragraph 1. The broad language of this paragraph, discouraging employees from publicly discussing on the internet "any work-related matters, whether confidential or not," would reasonably be interpreted by employees to encompass online discussions relating to employee terms and conditions of employment. Accordingly, it is overbroad. See *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014), affd. ___ Fed. Appx. ___, 2015 WL 6161477 (2d Cir. Oct. 21, 2015).[84]

Paragraph 2. This paragraph, which requires employees to "protect" their coworkers' "home addresses" and "other personal information," and the confidentiality of accessible company "financial information" and "nonpublic information," would reasonably be construed to prohibit or restrict employees from disclosing their coworkers' contact information and wages, hours, and working conditions as part of a union organizing or public campaign to improve their terms and conditions of employment. Accordingly, like the similar confidentiality provisions in the Wallace separation agreement and handbook section on company confidential information, it is overbroad. See secs. C.1.b, and D.1, above, and cases cited there. See also *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 2 (2015) ("confidentiality" provision in employer's handbook prohibited employees from disclosing "to anyone outside the company, indirectly or directly," including "participation in internet chat rooms or message boards," "any information about the company which has not been shared by the company with the general public," including but not limited to "organizational charts, salary structures, [and] policy and procedures manuals"); and *Lily Transportation*, 362 NLRB No. 54, slip op. at 1 nn. 2, 3 and JD. at 6–7 (provisions in employer handbook prohibited employees from disclosing "employee information maintained in confidential personnel files" and from posting on the internet "information or comments about [the company or its] . . . employees or employees' work that have not been approved by [the company]").

Paragraph 3. This paragraph, which prohibits employees from using blogs to, among other things, "malign" or "disparage" coworkers or managers, would reasonably be interpreted by employees to include protected union or other concerted activity. Thus, like the similar provision in the Wallace separation agreement, it is overbroad. See sec. C.1.b, above, and cases cited there. See also *UPMC*, 362 NLRB No. 191, slip op. at 2 n. 5 and JD. at 24–25 (employer's acceptable-use policy prohibited employees, without prior written consent, from using company computers, even on nonworking time, to establish or participate in websites or social networks

[84] The Company does not contend that this paragraph (or paragraph 10) is lawful because it uses the word "discourages," rather than "prohibits." In any event, Board precedent indicates to the contrary. See *Boeing Co.*, 362 NLRB No. 195 (2015), and cases cited there.

that "disparage or misrepresent," or make "false or misleading statements regarding" the company).

Paragraphs 6 & 7. These provisions, which prohibit or require approval for employees to use Shamrock's logo or trademarks, or post copyrighted information in documents containing its name, trademark, or logo, on any personal blogs or other online sites, are also overbroad. See *id.*, slip op. at 2 n. 5 and JD. at 25, and cases cited there.

Paragraph 8. This provision, which requires company permission to post on personal blogs photos of company events, coworkers or company representatives engaged in company business, or company products, would reasonably be interpreted to encompass photos documenting unsafe or hazardous working conditions and equipment or other evidence relevant to employment-related disputes. Accordingly, it is likewise overbroad. See *Whole Foods Market, Inc.,* 363 NLRB No. 87 (2015) (employer's rule prohibited all recording, including using cameras to record images, without prior approval of the company or consent of all parties); and *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op. at 3–4 (employer's rule banned use of cameras, camera phones, audio-visual and other recording equipment on company property without authorization), and cases cited there. See also the cases cited above with respect to paragraphs 1–3.

Paragraph 10. This provision, which discourages employees from linking to Shamrock's external website from personal blogs, would restrict employees' ability to identify or direct others to the Company's website in discussing company policies or terms and conditions of employment. Accordingly, it is overbroad as well. Cf. *UPMC*, above.

Finally, the Company does not contend that any of the foregoing paragraphs are saved by the general qualifiers or disclaimers set forth in paragraphs 5 and 11 regarding employees' "right to express personal opinions" about "organizing" and other "rights under Section 7 of the NLRA." Indeed, neither the General Counsel nor the Company even mention these provisions in their posthearing briefs. In any event, Board precedent indicates that they are insufficient to do so. See *Solarcity Corp*., 363 NLRB No. 83, slip op. at 6 (2015), and cases cited there. Accordingly, all seven paragraphs violate the Act as alleged.

9. Guideline to prohibited activities

The same section also includes a subsection entitled "Guideline to Prohibited Activities." It states in relevant part:

> The following behaviors are examples of previously stated or additional actions to activities that are prohibited and considered improper use of the Internet, E-mail or voicemail systems provided by Shamrock. These examples are provided as guidelines only and are not all-inclusive:
>
> [1.] Sending or posting confidential material, trade secrets, or proprietary information outside of the organization.
>
> * * *
>
> [13.] Refusing to cooperate with security investigations.

> [14.] Sending or posting chain letters, solicitations, or advertisements not related to business purposes or activities.
>
> * * *
>
> [16.] Sending or posting messages that disparage another organization.
>
> * * *
>
> Shamrock will not construe this policy nor apply it in a manner that interferes with associates' rights under Section 7 of the NLRA. [GC Exh. 3, p. 62].

The General Counsel contends that this subsection is unlawfully overbroad for essentially the same reasons as the previous subsection discussed above. However, unlike that subsection, this subsection indicates that it applies only to Company computers and equipment. And, as previously discussed, there is no evidence the employees have access them. Accordingly, this allegation is dismissed.[85]

10. Reporting violations

The same section also includes a subsection entitled "Reporting Violations," which states:

> Shamrock requests and urges associates to use official company communications to report violations of Shamrock's blogging rules and guidelines, customers' or associates' complaints about blog content, or perceived misconduct or possible unlawful activity related to blogging, including security breaches, misappropriation or theft of proprietary business information, and trademark infringement. Associates can report actual or perceived violations to supervisors, other managers, or to Human Resources.
>
> As a condition of employment and continued employment, associates are required to sign an Electronic and Telephonic Communications Acknowledgement Form. Applicants are required to sign this form on acceptance of an employment offer by Shamrock.

As discussed above, the Company's blogging rule is unlawfully overbroad, i.e., it would reasonably be read to prohibit or restrict protected union or other concerted activities. Thus, as indicated by the General Counsel, this provision effectively solicits employees to report such protected activities to the Company. Accordingly, it is unlawful. See *Montgomery Ward*, 269 NLRB 598, 600 (1984) (employer's no-distribution rule directed employees to report conduct that it unlawfully prohibited). See also *Bill's Electric, Inc*., 350 NLRB 292, 306 (2007); and *Dillon Cos.*, 340 NLRB 1260, 1267 (2003).

[85] As with the previous subsection, the Company does not contend that this subsection is saved by the last sentence purporting to preserve employees' "rights under Section 7 of the NLRA."

11. Guidelines to appropriate conduct

The handbook also contains a section entitled "Guidelines to Appropriate Conduct." It states in relevant part as follows:

> *Listed below are some of the rules and regulations of Shamrock. This list should not be viewed as all-inclusive. It is intended only to illustrate the types of behavior and conduct that Shamrock considers inappropriate and grounds for disciplinary action up to and including termination of employment without prior warning, at the sole discretion of the company, including, but not limited to, the following*:
>
> * * *
>
> [2.] Theft and/or deliberate damage or destruction of property not belonging to the associate, including the misuse or unauthorized use of any products, property, tools, equipment of any person or the unauthorized use of any company-owned equipment.
>
> * * *
>
> [6.] Any act that interferes with another associate's right to be free from harassment or prevents an associate's enjoyment of work, including sexual or other harassment, wasting the associate's time, harming or placing the associate in harm's way, immoral or indecent conduct or conduct that creates a disturbance in the workplace.
>
> Shamrock will not construe this policy nor apply it in a manner that interferes with associates' rights under Section 7 of the National Labor Relations Act. [GC Exh. 3, pp. 83–84.]

The General Counsel alleges that paragraph 2 above is unlawfully overbroad because employees "would reasonably understand it to encompass their use of [the Company's] email system or their engaging in conduct that [the Company] considered 'misuse' of that system," including protected communications on nonworking time (Br. 84). However, as discussed above, the employees do not have access to the Company's email system. Accordingly, this allegation is dismissed.

Unlike paragraph 2, paragraph 6 is not limited to use of the Company's computers or other equipment. Further, as indicated by the General Counsel, its broad prohibition on "any act" that "prevents an associate's enjoyment of work," including "conduct that creates a disturbance in the workplace" would reasonably be understood to encompass protected union or other concerted activities.[86] See *Ryder Transportation Services*, 341 NLRB 761 (2004) ("It is well settled that the Act allows employees to engage in persistent union solicitation even when it

[86] The General Counsel's posthearing brief also argues that the term "harassment" would reasonably be interpreted by employees to include protected conduct. However, *Lutheran Heritage* itself held to the contrary, 343 NLRB at 648–649, and the General Counsel cites no legal or factual basis for distinguishing that case.

annoys or disturbs the employees who are being solicited."), enfd. 401 F.3d 815 (7th Cir. 2005). See also the discussion and cases cited in section B.7 above. Finally, as with other provisions, the Company does not contend that this provision is saved by the last sentence of the section purporting to preserve employees' "rights under Section 7 of the [NLRA]." Accordingly, the provision is unlawful.

12. No solicitation or distribution

The handbook also includes a section entitled "No Solicitation, No Distribution," which states:

> Shamrock believes that the work time of our associates should be devoted to their work-related activities, and that it is neither safe nor productive for our associates to be distracted by individuals engaged in non-work related activities during work time or in work areas. Thus, the conducting of non-company business related activities is prohibited during the working time by either the associate doing the soliciting or the associate being solicited or at any time in customer or public areas. Associates may not solicit other associates under any circumstances for any non-company related activities.
>
> The distribution of non-company literature, such as leaflets, letters or other written materials by an associate is not permitted during the working time of either the associate doing the distributing or the associate to whom the non-company literature is being distributed, or any time in working areas or in customer and public areas.
>
> It is important that we keep our associates informed on all matters that involve them. Company bulletin boards/email is our primary means for posting notices and other materials related to our associates and our business. In order to avoid any confusion over what may or may not be posted on Shamrock bulletin boards, and to avoid obscuring important business-related materials with items which are of a personal nature, Shamrock bulletin boards are to be used solely for the posting of Shamrock business-related notices and materials. If you would like to post any Shamrock business-related materials, please see your Department Manager, the General Branch Manager or the Human Resources Representative. Only these Individuals are authorized to approve and post information on Shamrock bulletin boards. [GC Exh. 3, p. 65.]

The first and second paragraphs of this section explicitly ban soliciting or distributing in customer or public areas at any time. Thus, as indicated by the General Counsel, they would reasonably be construed to prohibit off-duty employees from engaging in union solicitation or distribution in such areas, including in parking lots and other public nonworking areas between shifts. Accordingly, they are unlawful. See *Times Publishing Co*., 231 NLRB 207 (1977), enfd. in relevant part and remanded on other grounds 576 F.2d 1107 (5th Cir. 1978) (employer's rule prohibited solicitation and distribution in public areas at any time); and *Bankers Club, Inc*., 218 NLRB 22, 27 (1975) (employer's rule banned solicitation or distribution in customer areas at any time), cited with approval in *Purple Communications*, 362 NLRB No. 126, slip op. at 13. See

also *Golub Corp*., 338 NLRB 515 (2002); and *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999), and cases cited there.

The General Counsel contends that the first paragraph is also overbroad because it bans, not just soliciting, but also "the conducting of non-company business related activities" during working time. The General Counsel argues that this language "would reasonably be read to prohibit employees from discussing their working conditions or . . . the state of an organizing campaign during working time, even though there is no restriction on other types of discussions at the facility." (Br. 86.) However, there are two problems with this argument. First, both the title of the section and the remainder of the paragraph indicate that the term "non-company business" refers to soliciting. Second, the General Counsel cites no record evidence that the Company actually permits discussions about personal matters other than working conditions and union organizing during working time. Cf. *Hertz Corp*., 316 NLRB 672, 687 (1995) (record evidence established that the employer had not enforced any restrictions on what employees could say to each other in working areas during working time). The argument therefore fails.

The General Counsel also alleges that the third paragraph is unlawful because it requires employees to seek approval before posting any information at the facility, including in nonworking areas, citing *Brunswick Corp*., 282 NLRB 794, 795 (1987). However, *Brunswick* involved a no-solicitation rule, not a no-posting rule. Unlike with solicitation/distribution, the law permits an employer to prohibit employees from posting materials anytime and anywhere in the facility as long as the employer does not apply the ban in a discriminatory manner. *Flamingo Hilton*, 330 NLRB 287, 293 (1999). See also *St. Francis Medical Center*, 347 NLRB 368, 370 (2006) ("The comparison between solicitation/distribution and posting is a comparison of 'apples to oranges'."). The General Counsel does not contend or cite any record evidence that the Company has applied its no-posting rule in a discriminatory manner. Accordingly, this allegation is dismissed.

13. Cell phone use

Finally, the General Counsel also alleges that the Company has unlawfully promulgated and maintained an overbroad cell phone rule (Tr. 750, 844). The rule is set forth in a January 2, 2015 memorandum that the Company posted entitled "Head/Ear & Cell Phone Use." The memo states:

> In an effort to improve the workplace safety environment, ensure the safety of our associates and to maintain compliance with State, Federal and regulatory agencies, the use of all musical devices to include, but not limited to cell phones and head/ear phone use within the warehouse is being discontinued effective January 4, 2015.
>
> Beyond the impact of the individual noise level, personal music devices create a potential hazard. They impair a worker's ability to hear surrounding sounds and compromise the user's general alertness and concentration; therefore they may be considered a hazard within the workplace. This is especially true if working around moving equipment or in circumstances where a worker must be able to hear warning sounds.

> An EMERGENCY phone line is in place should a family member need to be contacted while at work and the message will be relayed to you. This line is for emergency use ONLY. [GC Exh. 27].

The General Counsel argues that the foregoing memo sets forth a "a sweeping prohibition on the use of cell phones," which would reasonably be interpreted "to ban the use of cell phones for any purpose whatsoever, including recording working conditions for any number of reasons protected under the Act." The General Counsel contends that it is therefore unlawful, citing *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op. at 4 (employer's rule banned use of cameras or any other type of audio visual recording equipment unless authorized for business purposes). (Br. 87.)

As indicated by the Company, however, the rule on its face does not ban employees from carrying cell phones or using them to take pictures or videos. Rather, it is clear from both the rule and the accompanying explanation/justification in the memo that the ban is limited to the use of cell phones for listening to music or making or receiving calls.[87] Accordingly, this allegation is dismissed.

CONCLUSIONS OF LAW

1. The Respondent Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

a. Threatening employees at a January 28, 2015 town hall meeting that they would lose benefits if they supported a union.

b. Soliciting employees' complaints and grievances and promising to remedy them at a January 28 roundtable meeting if employees refrained from supporting a union.

c. Soliciting employees' complaints and grievances and promising to remedy them at a February 5 communication meeting if employees refrained from supporting a union.

d. Telling employees at a February 24 union education meeting to report to management if union supporters solicited them to sign a union card.

e. Promising or granting benefits to employees on April 29 by committing, both at a communication meeting and in writing, that employees would not be laid off, to discourage support for a union.

f. Threatening employees at the April 29 communication meeting with unspecified reprisals if they supported a union.

g. Informing employees at the April 29 communication meeting that it would be futile for them to support a union.

[87] Again, the General Counsel's posthearing brief omits and entirely ignores the second and third paragraphs of the memo.

2. The Company also engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

a. Interrogating an employee on January 28, 2015 about whether he supported a union.

b. Surveilling employees' union activities on January 28.

c. Creating the impression of surveilling an employee's union activities on April 27.

d. Surveilling employees' union activities on April 29.

e. Interrogating employees about their union activities on April 29.

f. Surveilling and creating the impression of surveilling an employee's union activities on May 1.

g. Orally promulgating a discriminatory and overbroad rule at a May 5 meeting with an employee that prohibited union supporters from "heckling" or "insulting" employees or soliciting in a manner "where somebody could perceive it as intimidation" or "feel threatened or intimidated," and threatening the employee with reprisals if he violated the above rule.

h. Promulgating a discriminatory and overbroad rule in a May 8 letter to all employees that prohibited union supporters from engaging in "unlawful bullying" or "unlawfully coercive behavior," requesting employees to report to management if the rule was violated, and threatening to refer violations of the rule to law enforcement for prosecution.

i. Taking union flyers away from employees on May 25.

j. Interrogating employees on May 25 about whether they supported the union.

k. Granting wage increases to employees on May 29 to discourage support for the union.

3. The Company also engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

a. Maintaining an overbroad rule in its Associate Handbook on "Protecting the Company's Confidential Information" since at least October 15, 2014 that designates as confidential any "information, knowledge, or data" concerning "associates," "Company manuals and policies," and "compensation schedules."

b. Maintaining an overbroad rule in the handbook on "Blogging" since the same date that:

1. Discourages employees from publicly discussing on the internet "any work-related matters, whether confidential or not."

2. Requires employees to "protect" their coworkers' "home addresses" and "other personal information," and the confidentiality of accessible company "financial information" and "nonpublic information."

3. Prohibits employees from using blogs to "malign" or "disparage" coworkers or managers.

4. Prohibits or requires company approval for employees to use the company logo or trademarks, or post copyrighted information in documents containing its name, trademark, or logo, on any personal blogs or other online sites.

5. Requires company permission to post on personal blogs photos of company events, coworkers or company representatives engaged in company business, or company products.

6. Discourages employees from linking to the Company's external website from personal blogs.

c. Maintaining an overbroad rule in the handbook on "Reporting Violations" since the same date that solicits employees to report any of the above prohibited blogging activities to the Company.

d. Maintaining an overbroad rule in the handbook on "Guidelines to Appropriate Conduct" since the same date that prohibits "any act" that "prevents an associate's enjoyment of work," including "conduct that creates a disturbance in the workplace."

e. Maintaining an overbroad rule in the handbook on "No Solicitation, No Distribution" since the same date that bans soliciting or distributing in customer or public areas at any time.

f. Offering a "Separation Agreement and Release and Waiver" to an employee on April 6, 2015 that prohibited disclosing "confidential information," including any "personnel or corporate information," and making remarks or taking actions that are disparaging or detrimental to the Company, following termination of employment.

4. The Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act by discharging Thomas Wallace on April 6, 2015 because of his protected concerted and union activities and to discourage employees from engaging in such activities.

5. The Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act by disciplining Mario Lerma on May 5, 2015 because of his protected union activities and to discourage employees from engaging in such activities.

6. The Company did not otherwise violate the Act as alleged in the complaint.

REMEDY

The appropriate remedy for the foregoing violations is an order requiring the Company to cease and desist and to take certain affirmative action. Specifically, in the event Wallace has not already been reinstated, the Company will be required to offer him immediate and full reinstatement to his former position.[88] In addition, the Company will be required to make him whole for any loss of earnings and other benefits as a result of his unlawful termination. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center,* 356 NLRB 6 (2010).

As set forth in *Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Company will also be required to compensate Wallace for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.[89]

In addition, the Company will be required to remove from its files any reference to the unlawful termination of Wallace and discipline of Lerma, and to notify them in writing that this has been done and that the termination or discipline will not be used against them in any way.

The Company will also be required to rescind, in writing, the discriminatory and overbroad rule it orally promulgated at the May 5 meeting with Lerma, the discriminatory and overbroad rule set forth in its May 8 letter to all employees, and the overbroad separation agreement it offered to Wallace on April 6. The Company will likewise be required to rescind the overbroad handbook rules, and furnish all current employees with inserts for their current employee handbooks that (1) advise that the unlawful rule has been rescinded, or (2) provide a lawfully worded rule on adhesive backing that will cover the unlawful rule; or publish and distribute to all current employees revised employee handbooks that (1) do not contain the unlawful rule, or (2) provide a lawfully worded rule.

In addition, the Company will be required to post a notice to employees, in both English and Spanish, stating that it will not continue to engage in the same or any like or related unlawful conduct and that it will affirmatively remedy its unlawful conduct as ordered.

Given the severity and scope of the Company's unfair labor practices, and the fact that many of them were committed by high-level officials and/or at large and small mandatory meetings, the notice must also be read aloud to the employees. Specifically, President/CEO Kent McClelland or Operations VP Engdahl, or, if the Company chooses, a Board agent in their

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[88] See, e.g., *Kellogg Company*, 362 NLRB No. 86, slip op. at 8 (2015). On February 1, 2016, the U.S. District Court in Arizona (Humetewa, J.) granted the General Counsel's request for a temporary injunction under Section 10(j) of the Act requiring the Company to offer Wallace reinstatement pending a final decision by the Board. *Overstreet v. Shamrock Foods Co*., CV-15-01785-PHX-DJH.

[89] The General Counsel also requests search-for-work expenses, i.e. that the Company be required to reimburse Wallace for all expenses he incurred searching for interim work. This remedy is denied as it would involve a change in Board law. See *Katch Kan USA LLC*, 362 NLRB No. 162, slip op. at 1 n. 2 (2015).

presence, must read the remedial notice aloud to all warehouse employees at one or more mandatory meetings scheduled during working time to ensure the widest possible attendance. A Spanish-language interpreter must be present as well to translate the reading for employees who are not fluent in both English and Spanish. See *OS Transport LLC*, 358 NLRB 1048, 1049 (2012), reaffd. 362 NLRB No. 34 (2015); and *Homer D. Bronson*, 349 NLRB at 515, and cases cited there.

According, based on the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[90]

ORDER

The Respondent, Shamrock Foods Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or disciplining employees because of their protected concerted or union activities and to discourage employees from engaging in such activities.

(b) Threatening employees that they would lose benefits if they supported a union.

(c) Soliciting employees' complaints and grievances and promising to remedy them if employees refrained from supporting a union.

(d) Promising or granting benefits to employees by committing that they would not be laid off to discourage support for a union.

(e) Granting wage increases to employees to discourage support for the union.

(f) Telling employees to report to management if union supporters solicited them to sign a union card.

(g) Threatening employees with unspecified reprisals if they support a union.

(h) Informing employees that it would be futile for them to support a union.

(i) Interrogating employees about whether they support a union.

(j) Surveilling employees' union activities.

(k) Creating the impression of surveilling employees' union activities.

(l) Taking union flyers away from employees.

[90] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(m) Promulgating discriminatory or overbroad rules, either orally or in writing, that restrict employees' right to engaged in protected union activities.

(n) Requesting employees to report to management if the discriminatory or overbroad rules are violated.

(o) Threatening employees with discharge or other unspecified reprisals, and to refer the matter to law enforcement for prosecution, if they violate the discriminatory or overbroad rules.

(p) Maintaining overbroad rules in the Associate Handbook that prohibit, restrict, or discourage employees from engaging in protected union and other concerted activities.

(q) Offering a "Separation Agreement and Release and Waiver" to employees that includes provisions prohibiting employees from engaging in protected union and other concerted activities following termination of employment.

(r) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Thomas Wallace full reinstatement to his former job or, if that job no longer exists, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Wallace whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Compensate Wallace for any adverse tax consequences of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of the Board's Order, remove from the Company's files any reference to the unlawful April 6, 2015 termination of Wallace, and within 3 days thereafter notify him in writing that this has been done and that the termination will not be used against him in any way.

(f) Within 14 days from the date of the Board's Order, remove from the Company's files any reference to the unlawful May 5, 2015 discipline of Mario Lerma, and within 3 days

thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

(g) Within 14 days of the Board's Order, rescind, in writing, the discriminatory and overbroad rule it orally promulgated at the May 5 meeting with Lerma that prohibited union supporters from "heckling" or "insulting" employees or soliciting in a manner "where somebody could perceive it as intimidation" or "feel threatened or intimidated."

(h) Within 14 days of the Board's Order, rescind, in writing, the discriminatory and overbroad rule set forth in the May 8 letter to all employees that prohibited union supporters from engaging in "unlawful bullying" or "unlawfully coercive behavior."

(i) Within 14 days of the Board's Order, rescind, in writing, the "Separation Agreement and Release and Waiver" that prohibits employees from disclosing "confidential information," including any "personnel or corporate information," and making remarks or taking actions that are disparaging or detrimental to the Company, following termination of employment.

(j) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "Protecting the Company's Confidential Information" that designates as confidential any "information, knowledge, or data" concerning "associates," "Company manuals and policies," and "compensation schedules."

(k) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "Blogging" that: (1) discourages employees from publicly discussing on the internet "any work-related matters, whether confidential or not"; (2) requires employees to "protect" their coworkers' "home addresses" and "other personal information," and the confidentiality of accessible company "financial information" and "nonpublic information"; prohibits employees from using blogs to "malign" or "disparage" coworkers or managers; (4) prohibits or requires company approval for employees to use the company logo or trademarks, or post copyrighted information in documents containing its name, trademark, or logo, on any personal blogs or other online sites; (5) requires company permission to post on personal blogs photos of company events, coworkers or company representatives engaged in company business, or company products; and (6) discourages employees from linking to the Company's external website from personal blogs.

(l) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "Reporting Violations" that solicits employees to report any of the above prohibited blogging activities to the Company.

(m) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "Guidelines to Appropriate Conduct" that prohibits "any act" that "prevents an associate's enjoyment of work," including "conduct that creates a disturbance in the workplace."

(n) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "No Solicitation, No Distribution" that bans soliciting or distributing in customer or public areas at any time.

(o) Furnish all current employees with inserts for their current employee handbooks that (1) advise that the above unlawful rules have been rescinded, or (2) provide lawfully worded rules on adhesive backing that will cover the unlawful rules; or publish and distribute to all current employees revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully worded rules.

(p) Within 14 days after service by the Region, post at its warehouse in Phoenix, Arizona copies of the attached notice marked "Appendix"[91] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 15, 2014.

(q) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the warehouse employees by the Respondent's President/CEO Kent McClelland or Operations Vice President Mark Engdahl, or, if the Company chooses, a Board agent in their presence, with translation available for Spanish-speaking employees.

(r) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 11, 2016

Jeffrey D. Wedekind
Administrative Law Judge

[91] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge, discipline or otherwise discriminate against any of you for supporting Bakery, Confectionary, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC, or any other union.

WE WILL NOT threaten you with loss of benefits if you support a union.

WE WILL NOT solicit your complaints and grievances and promise to remedy them if you refrain from supporting a union.

WE WILL NOT promise or grant benefits to discourage you from supporting a union.

WE WILL NOT grant wage increases to discourage you from supporting a union.

WE WILL NOT ask or tell you to report if union supporters solicit you to sign a union card.

WE WILL NOT threaten you with unspecified reprisals if you support a union.

WE WILL NOT inform you that it would be futile for you to support a union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT watch or monitor you in order to find out about your union activities, or create the impression that we are doing so.

WE WILL NOT take union flyers away from you.

WE WILL NOT impose discriminatory or overbroad rules, either orally or in writing, that restrict your right to engage in protected union activities, request that you report if such rules are

violated, or threaten to discharge or take unspecified reprisals against you, or to refer the matter to law enforcement for prosecution, if you violate the rules.

WE WILL NOT maintain overbroad rules in the Associate Handbook that prohibit, restrict, or discourage you from engaging in protected union and other concerted activities.

WE WILL NOT offer you a "Separation Agreement and Release and Waiver" that prohibits you from engaging in protected union and other concerted activities following termination of your employment.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the Board's Order, offer Thomas Wallace full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Wallace whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Wallace for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Social Security Administration allocating Wallace's backpay to the appropriate calendar quarters.

WE WILL, within 14 days from the Board's Order, remove from our files any reference to the unlawful April 6, 2015 discharge of Wallace, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the Board's Order, remove from our files any reference to the unlawful May 5, 2015 discipline of Mario Lerma, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL, within 14 days from the Board's Order, rescind the "Separation Agreement and Release and Waiver" we offered to Wallace that prohibits disclosing "confidential information," including any "personnel or corporate information," and making remarks or taking actions that are disparaging or detrimental to the Company, following termination of employment.

WE WILL, within 14 days from the Board's Order, rescind, in writing, the discriminatory and overbroad rule we orally promulgated at our May 5 meeting with Lerma that prohibited union supporters from "heckling" or "insulting" employees or soliciting in a manner "where somebody could perceive it as intimidation" or "feel threatened or intimidated."

WE WILL, within 14 days from the Board's Order, rescind, in writing, the discriminatory and overbroad rule set forth in our May 8 letter to all employees that prohibited union supporters from engaging in "unlawful bullying" or "unlawfully coercive behavior."

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "Protecting the Company's Confidential Information" that designates as confidential any "information, knowledge, or data" concerning "associates," "Company manuals and policies," and "compensation schedules."

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "Blogging" that: (1) discourages you from publicly discussing on the internet "any work-related matters, whether confidential or not"; (2) requires you to "protect" your coworkers' "home addresses" and "other personal information," and the confidentiality of accessible company "financial information" and "nonpublic information"; prohibits you from using blogs to "malign" or "disparage" coworkers or managers; (4) prohibits or requires company approval for you to use the company logo or trademarks, or post copyrighted information in documents containing the company name, trademark, or logo, on any personal blogs or other online sites; (5) requires company permission for you to post on personal blogs photos of company events, coworkers or company representatives engaged in company business, or company products; and (6) discourages you from linking to the Company's external website from personal blogs.

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "Reporting Violations" that solicits you to report any of the above prohibited blogging activities to the Company.

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "Guidelines to Appropriate Conduct" that prohibits you from engaging in "any act" that "prevents an associate's enjoyment of work," including "conduct that creates a disturbance in the workplace."

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "No Solicitation, No Distribution" that prohibits you from soliciting or distributing in customer or public areas at any time.

WE WILL furnish you with inserts for your current associate handbooks that (1) advise that the above unlawful rules have been rescinded, or (2) provide lawfully worded rules on adhesive backing that will cover the unlawful rules; or publish and distribute to you revised associate handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully worded rules.

SHAMROCK FOODS COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-150157 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.